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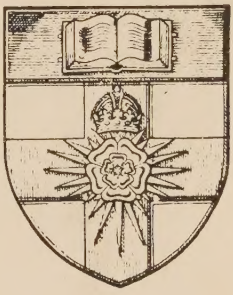

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# THE IRISH REPORTS.

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IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

## 1898.

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## Lord Chancellor.

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## Lords Justices of Appeal.

The Right Hon. Gerald FitzGibbon.
The Right Hon. Samuel Walker.
The Right Hon. Hugh Holmes.

## Master of the Rolls.

The Right Hon. Andrew Marshall Porter.

## Vice-Chancellor.

The Right Hon. Hedges E. Chatterton.

## Land Judge.

The Hon. John Ross.

## Attorney-General.

The Right Hon. John Atkinson.

## Solicitor-General.

Dunbar Plunket Barton, Q.C.

[These Reports will be cited as follows :—[1898] 1 I. R.]

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# CASES

DETERMINED BY

## THE CHANCERY DIVISION

OF

## THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

## THE COURT OF APPEAL.

---

# 1898.

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### Ex parte the Credit of THE MAYOR, ALDERMEN, and BURGESSES of the BOROUGH of BELFAST; In the MATTER of the RAILWAYS ACT (IRELAND), 1851, and of the BELFAST IMPROVEMENT ACT, 1884, and the Acts incorporated therewith; Ex parte REID; and in the MATTER of the SETTLED LAND ACTS, 1882 to 1890.

*M. R.*
1897.
June 29.

*Settled Land Acts—Compulsory purchase—Payment out of Court—Appointment of trustees.*

By post-nuptial settlement lands were conveyed to trustees, upon trust for the wife, without power of anticipation, and after the death of the husband or wife upon trust for the survivor for life, and subject thereto upon trust for the children of the marriage as the husband and wife should jointly appoint. The settlement contained a power of advancement but no express power of sale.

Part of the lands having been taken under compulsory powers, the husband and wife appointed the trust property to the children of the marriage, and a joint application for payment out of the fund to the trustees was made by the husband, wife, children, and trustees.

*M. R.* 1897.

*In re* BELFAST IMPROVEMENT ACTS; *Ex parte* REID.

An order was made appointing the trustees of the settlement trustees for the purposes of the Settled Land Acts, and directing the fund to be paid out to them, to be held upon the trusts of the settlement.

MOTION. This was an application on behalf of William Reid, Alexander Heron Moore, the Rev. William M'Ilwrath, Eleanor M'Ilwrath, Thomas M'Ilwrath, and Rhoda Jane Anderson M'Ilwrath, for an order that the Accountant-General should transfer and pay the sum of £933 14*s.* 6*d.* New Consols in Court to the credit of the matter and separate credit of the said William Reid and John Bole (now deceased), with any dividend accrued due thereon, to the said William Reid and Alexander Heron Moore, as the present trustees of the post-nuptial settlement, dated the 1st of November, 1860, made between the said Wm. M'Ilwrath and the said Eleanor M'Ilwrath his wife, of the one part, and Wm. Waugh and James Patton of the other part, to be held by the said Wm. Reid and Alexander Heron Moore, as such trustees as aforesaid upon the trusts of the settlement, and that (if necessary for the purpose of the application) the said Wm. Reid and Alexander Heron Moore should be appointed trustees of the said settlement of the 1st of November, 1860, for the purposes of the Settled Land Acts, 1882 to 1890.

By the settlement of the 1st of November, 1860, certain lands, tenements, and hereditaments in the borough of Belfast had been conveyed to William Waugh and James Patton, upon trust, after payment of the headrents, taxes, and all other necessary outgoings, to pay the residue of the rents and profits to Eleanor M'Ilwrath for her sole and separate use and benefit independently and exclusively of the said Wm. M'Ilwrath, and without being in anywise subject to his debts, control, interference, or engagements, her receipts, notwithstanding her coverture, to be sufficient discharge for the same, but so, nevertheless, that she should not have power to affect the same or any part thereof by any sale, mortgage, or charge, or otherwise in the way of anticipation, and from and after the death of either William M'Ilwrath or Eleanor M'Ilwrath, to pay the residue of such rents and profits to the survivor of them or his or her assigns for his or her life, and after the death of the survivor, to stand and be possessed of all the lands, tenements,

and hereditaments, and the residue of the rents and profits thereof, upon trust for such child or children of the said William and Eleanor M'Ilwrath, as they should by deed jointly direct or appoint, and in default of appointment upon certain trusts not material to be here set out.

The said settlement contained no power of sale. It contained a provision authorizing the trustees to levy and raise any part not exceeding one-half of the expectant, presumptive, or vested share of any child of the marriage, not exceeding one moiety of such child's share, and to pay and apply the same for the preferment, advancement, or benefit of such child.

Portion of the lands, the subject of the said settlement, had been taken by the Belfast Corporation in the year 1888, under the powers of compulsory purchase vested in them by the provisions of the Belfast Improvement Act, 1884, and the funds in Court represented the amount paid into Court by the Corporation on the 17th of August, 1888, under the provisions of the Lands Clauses Consolidation Act, 1845, which was incorporated with the Local Act of 1884.

On the 26th of June, 1889, an order had been made on the petition of the then existing trustees of the settlement for the payment of the dividend of the funds in Court to Eleanor M'Ilwrath for her separate use until further order.

The present trustees of the settlement were William Reid and Alexander Heron Moore.

There were two children of the marriage, namely, Thomas M'Ilwrath and Rhoda Jane Anderson M'Ilwrath.

By deed-poll dated the 5th of April, 1897, William M'Ilwrath and Eleanor M'Ilwrath exercised the power of appointment under the settlement in favour of their two children, the said Thomas M'Ilwrath and Rhoda Jane Anderson M'Ilwrath, both of whom had attained age, and joined in the present application.

There was an affidavit of fitness of the trustees proposed to be appointed in the usual form under the Settled Land Acts, and a verified consent of such trustees to act if so appointed.

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*Watts*, in support of the motion:—

The trustees have no present power of sale, but a future power of sale is implied in the power of advancement.

If this does not constitute them trustees for the purposes of the Settled Land Acts, as defined by the Settled Land Act, 1890, s. 16 (ii.), the Court should appoint them trustees for the purposes of the Acts, and pay out the money to them: *In re Wright's Trusts* (1); *In re Harrop's Trusts* (2); *In re Rathmines Drainage Act* (3); Settled Land Act, 1882, sects. 21 (ix.), 32; Settled Land Act, 1890, sect. 14.

*R. F. Harrison*, for the Corporation of Belfast:—

There is no objection to the proposed appointment, but they should be appointed trustees of the compound settlement made by the settlement and deed of appointment.

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Apart from the Settled Land Acts, there does not seem to be any power to grant this application. The provision in the marriage settlement of 1860, authorising the trustees to levy and raise any part not exceeding one-half of the expectant, presumptive, or vested share of any child of the marriage, does not make the trustees of that settlement trustees for the purposes of the Settled Land Acts, within the meaning of the Settled Land Act, 1890, section 16, sub-section 2. That sub-section only extends the definition of trustees for the purposes of the Acts, to "the persons (if any) who are for the time being under the settlement, trustees with future power of sale, or under a future trust for sale of the land to be sold." This application, however, has been entitled in the matter of the Settled Land Acts, as well as in the title of the credit to which the fund in Court stands, with a view to having the trustees of the settlement of 1860, if necessary, appointed trustees for the purpose of the Acts. It is, I think, a proper case to make the appointment, and I shall accordingly

(1) 24 Ch. D. 662. (2) *Ibid.* 717. (3) 15 L. R. Ir. 576.

appoint them trustees of the compound settlement created by the marriage settlement of 1860, and the deed of appointment of 1897. No question can arise as to this appointment being a fraud on the power, as the appointment has been made to the two children who would be entitled in default of appointment, and they have joined in this application; besides which the appointment, which is made irrevocably, extends to all the rest of the trust property, which is of considerable amount.

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I shall make an order that after advertisements the fund in Court be transferred to the applicants, to be received by them upon the trusts of the settlement.

Solicitor for the applicants: *W. B. Galway.*

Solicitor for the Corporation of Belfast: *Sir Samuel Black.*

W. L.

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## IN RE ELENA WALKER, DECEASED. LLOYD *v.* TWEEDY.

(1897. No. 413.)

*M. R.* 1897. June 27, 28. July 17.

*Will—Construction—Absolute gift—Subsequent gift over of "any balance remaining" after death of legatee.*

A testatrix bequeathed one-third of the residue of a sum of £6000 Consols to A. L., one-third to E. T., in trust for E. W., and one-third to E. T., in trust for M. W., and directed that any balance remaining in the hands of E. T., after the death of E. W., should go absolutely to E. T., and that any balance remaining in the hands of E. T. after the death of M. W. should be equally divided between the children of A. L. who should then be living.

*Held*, that the legacies to E. W. and M. W. were absolute gifts, and that the direction as to the balance was inoperative.

*Constable* v. *Bull* (3 De G. & Sm. 411) discussed.

ORIGINATING SUMMONS.

This was an application by Augusta Lloyd, Annie Lloyd, Robert Lloyd, Ellis Lloyd, Elena Lloyd, Almeda Lloyd, and Louisa Lloyd, the infant children of Henry Crofton Lloyd and Almeda Julianna Lloyd, against John Tweedy, George Taylor,

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and Robert Thomas Hamilton, the executors of the will of Elena Walker, deceased, and Elizabeth Anne Taylor, Eliza Mary West, and Margaret Walker, legatees under the said will, for an order to carry out the trusts of the said will, and to administer the personal estate so far as related to the legacies of £400, and of two-thirds of the balance of the sum of £6000 New Consols, and of the money due to the testatrix on foot of the annuity policies with the Liverpool, London and Globe Insurance Company, respectively bequeathed to the defendant Elizabeth Anne Taylor, in trust for the defendants Eliza Mary West and Margaret Walker respectively, with remainder to the plaintiffs.

The testatrix made her will, dated August 27th, 1896, the material portion of which was as follows:—

"I bequeath to my executors and two trustees hereinafter named, the sum of £6000 $2\frac{3}{4}$ per cent. Consolidated Government Stock, standing in the names of the late Henry Walker Thompson and my own, upon the trusts hereinafter declared concerning the same, that is to say, as to such sum of said stock as at the price of the day of my decease shall represent £4000 cash, upon trust to pay the income interest or annual produce of such sum to my niece Almeda Julianna Lloyd, wife of Henry Crofton Lloyd, of Collon, in the county of Louth, quarterly, or as the same shall be received by my trustees and executors, for and during the term of her natural life, and from and after the death of the said Almeda Julianna Lloyd I bequeath the said sum with any interest accruing thereon from the date of the last payment to her upon trust to be equally divided between the children of the said Almeda Julianna Lloyd surviving at the time of her death, who shall attain the age of twenty-one years, and, should the said Almeda Julianna Lloyd predecease me, I bequeath the said sum, and any interest thereon upon trust for all and every of the children of the said Almeda Julianna Lloyd who shall attain the age of twenty-one years, in equal shares and proportions as tenants in common . . . . and I direct that my said executors and trustees shall realize the balance of the said stock, and thereout pay the legacies given by this my will, and my funeral, testamentary, and other expenses connected therewith and the administration thereof, including the payment of duties to the Crown.

"I bequeath to Elizabeth Anne Taylor, wife of William Taylor of Howth-road, Clontarf, the sum of £400, as to £200, portion of said sum of £400, in trust for my sister Eliza Mary West, of 7, Bessborough Cottages, Clontarf, widow, and as to the remaining £200 of said sum in trust for my sister Margaret Walker.

[Here followed a number of pecuniary and other legacies] . . . "I direct that any balance remaining of the said £6000 $2\frac{3}{4}$ per cent. Government Consolidated Stock, as also whatever is due to me on foot of the two annuity policies I hold with the Liverpool and London and Globe Insurance Company, in the name of Eleanor Walker, after providing for the foregoing legacies, and my funeral, testamentary, and other expenses connected with this my will, and the administration thereof, including the payment of duties to the Crown, shall be divided in three equal shares. I bequeath such one-third share of same to the said Almeda Julianna Lloyd, another third I bequeath to the said Elizabeth Anne Taylor, in trust for my sister Eliza Mary West, and the remaining third I bequeath to the said Elizabeth Anne Taylor, in trust for my sister Margaret Walker, and I direct that any balance remaining in the hands of the said Elizabeth Anne Taylor, after the decease of the said Eliza Mary West, on foot of the legacies hereinbefore bequeathed in trust for the said Eliza Mary West, shall go absolutely to the said Elizabeth Anne Taylor, and I further direct that any balance remaining in the hands of the said Elizabeth Anne Taylor after the decease of the said Margaret Walker, on foot of the legacies hereinbefore bequeathed in trust for the said Margaret Walker, shall go to and be equally divided amongst the children of the said Almeda Julianna Lloyd, who shall then be living."

The testatrix devised and bequeathed all her real and personal estate, except what she otherwise disposed of by her will, or any codicil thereto, to her niece the said Almeda Julianna Lloyd, and appointed John Tweedy, George Taylor, and Robert Thomas Hamilton executors and trustees of her will.

On August 27th, 1896, the testatrix made a codicil to her will, which was as follows:—

"Whereas by my said will I provided for the apportionment of the balance of the amount held by Mrs. Elizabeth Anne Taylor,

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in trust for my sister Eliza Mary West, after the decease of the latter, giving such balance absolutely to the said Mrs. Elizabeth Taylor. Now, I hereby declare that of the said balance, as well as the balance, if any, of the amount lodged in the Provincial Bank, in our joint names, for the benefit of the said Mrs. Eliza Mary West, £40 thereof be paid to the said Mrs. Elizabeth Anne Taylor, and the remainder be divided between the children of the said Almeda Julianna Lloyd who shall then be living."

The testatrix died on the 2nd February, 1897, and probate of the will and codicil was, on the 5th March, 1897, granted to the defendants, John Tweedy, George Taylor, and Robert Thomas Hamilton. Almeda Julianna Lloyd, Elizabeth Anne Taylor, and Eliza Mary West survived the testatrix.

A question having arisen, whether the bequests in the will in favour of Eliza Mary West and Margaret Walker, were absolute gifts, or only in trust to pay the income thereof to the said legatees, with remainder to the children of Almeda Julianna Lloyd, this summons was brought in the name of the children by their father, Henry Crofton Lloyd.

*Oulton*, for the plaintiffs :—

The legacies to Eliza Mary West and Margaret Walker, which are in form absolute gifts, are cut down down to life interests by the gift over of "any balance remaining" in the hands of Elizabeth Anne Taylor after the death of the legatees: *Constable* v. *Bull* (1). In that case there was an absolute gift to the wife, followed by a direction, that at the death of the wife, "whatever remains of my said estate and effects," should go to certain persons, and it was held that the wife took only a life interest. There is no substantial difference between the words, "whatever remains," and the words "any balance remaining." So in *Re Adams' Trusts* (2), where the words were, "at his death I wish all remaining to be for the benefit of B. and C.," and in *Bibbens* v. *Potter* (3), where the testatrix gave all the property to A. absolutely, and by a codicil she gave, after the death of A., "all property of mine, which may be then remaining, to my brother B." In *Re*

(1) 3 De G. & Sm. 411. (2) 14 W. R. 18. (3) 10 Ch. D. 753.

*Shendon and Kemble* (1) the testator, after giving all his property to his wife, concluded his will thus: "and I also desire that at the decease of my wife, what may remain of my property shall be equally divided amongst my surviving children." Kay, J., held that the case was undistinguishable from *Constable* v. *Bull* (2), and that the intention was to give the wife a life interest only. In *Williams* v. *Pounder* (3), the testator gave his residue to his wife absolutely, but by a codicil revoked this gift, and gave his residue to her for her own absolute use and benefit and disposal, but without prejudice to the absolute power of disposal by his wife of the said residue; in case at her death any part thereof "remained undisposed of" by her, he gave the same to two other persons. Kay, J., held that the wife took a life interest, with a power of disposition by act *inter vivos*, but not by will. He there follows *In re Thomson*; *Herring* v. *Barrow* (4). There the gift was to the testator's widow "for the term of her natural life, to be disposed of as she might think proper for her own use and benefit," with a gift over "in the event of her decease, should there be anything remaining of the said property," and the Court of Appeal held that the widow had no power of testamentary disposition, and inclined to the opinion that she took nothing but a life estate, with a right to enjoy the property in specie. Here there are no words giving power to dispose of the property, and the fact that a trustee is interposed is in favour of the plaintiff's contention, as there could be no object in having a trustee if the legacies were to be absolute, whereas it would be necessary to preserve the *corpus*. The effect of the cases is summarized in Jarman on Wills, vol. i., p. 334. The use of the words, "the balance," in the codicil, shows that the testatrix thought something was to go over.

*T. Pakenham Law, Q.C.*, for Margaret Walker:—

The gift of £400 to Elizabeth Taylor in trust for Margaret Walker was an absolute gift to Margaret Walker. The fact that a legacy is given to a trustee in trust for the legatee does not

(1) 53 L. T. (N. S.) 527.
(2) 3 De G. & Sm. 511.
(3) 56 L. J., Ch. 511.
(4) 14 Ch. D. 263.

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prevent the gift being absolute: *Clancy* v. *O'Callaghan* (1); *Mills* v. *Johnston* (2). The residue is given in thirds, and one-third is undoubtedly given direct to Almeda Lloyd without the interposition of a trustee. The codicil merely varies the disposition of "the said balance," and does not affect the words of the original gift. The word "balance" shows that there was a power of disposition of the *corpus* given to Margaret Walker, and she is absolutely entitled to the one-third. Where such a power is given in a will, a gift over has been held void: *Ross* v. *Ross* (3); *Brown* v. *Goslett* (4). In *Watkins* v. *Williams* (5) a testatrix devised lands to her husband, with power to raise any sum by sale or mortgage, with a proviso that such part of any money so raised as should be unexpended at his death should be charged on certain property of the husband, and paid to his nieces in equal shares. Lord Truro held that the condition was void, inasmuch as where a money fund is given to a person absolutely, a condition cannot be annexed to the gift, that so much as he shall not dispose of, shall go over to another person. *Constable* v. *Bull* (6), and *Re Shendon and Kemble* (7), are distinguishable, also *Re Adams' Trusts* (8), which was the case of a codicil.

*C. W. R. Brady*, for Eliza Mary West:—

The word "balance" shows that the testatrix contemplated a diminution of the fund. Mrs. West not being capable of managing her own affairs, it was natural that the testatrix should appoint a trustee of the small capital sum intended for her. In the cases relied on on behalf of the plaintiffs the words "at the death" came first. Kay, J., relies on this in *Re Shendon and Kemble* (7). In that case the gifts were to wife and child, here they are to sisters, with a gift over to a remoter class. In *Sprange* v. *Barnard* (9) the words were "at his death, the remaining part of what is left, that he does not want for his own wants," and it was held that the gift over was void for uncertainty of the subject matter of the gift. In

(1) [1897] 1 Ir. R. 290.
(2) [1894] 3 Ch. 204.
(3) 1 Jac. & W. 54.
(4) 27 L. J., Ch. 249.
(5) 3 M'N. & G. 624.
(6) 3 De G. & Sm. 411.
(7) 53 L. T. (N. S.) 527.
(8) 14 W. R. 18.
(9) 2 B. C. C. 585.

*Bull* v. *Kingston* (1) the testatrix gave to her sister, a married woman, the unlimited right of disposing by will of what the testatrix had not otherwise disposed of, followed by a gift over, in case the married woman died without a will, of "all that may remain of my fortune at her death"; it was held that the gift to the married woman was absolute, and that the gift over was void for uncertainty. In *Perry* v. *Merritt* (2) the Court refused to give effect to the gift over on the ground that it was too indefinite, and repugnant to the power of disposition to the wife. The words of the gift over there were "and all the money (if any) that shall be remaining after payment of the debts of my dear wife." That was considered to mean the money remaining after what the wife had thought fit to spend. That is the same as "the balance" here.

*J. M. Day*, for the defendants, the executors.

*Oulton*, in reply :—

The cases cited are distinguishable. They contain an express intimation that the first legatee had a power of disposition over the entire fund. The words "*after* the decease" are stronger than "*at* the decease," and the legatees take only the income of the fund.

THE MASTER OF THE ROLLS :—

July 17.

The question in this case arises upon the will and codicil of Miss Elena or Eleanor Walker, dated respectively the 27th August and 25th September, 1896, in reference to legacies in trust for the testator's sisters Eliza Mary West and Margaret Walker. On behalf of these ladies the benefits are claimed as absolute gifts; and this contention is disputed on the ground that they take life interests only. No other view was argued.

The scheme of the will is as follows :—Miss Walker seems to have been possessed of considerable personal and some real estate. Of the former, the chief item was a sum of £6000 $2\frac{3}{4}$ per cent. Consols, of which she disposed of £4000 as follows :—"I bequeath to my executors and trustees hereinafter named, the sum of £6000 $2\frac{3}{4}$ per cent. Consolidated Government Stock, standing in the

(1) 1 Mer. 314. (2) L. R. 18 Eq. 152.

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names of the late Henry Walker Thompson and my own, upon the trusts hereinafter directed concerning the same, that is to say, as to such sum of said stock as at the price of the day of my decease shall represent £4000 cash, upon trust to pay the income, interest, or annual produce, of such sum to my niece, Almeda Julianna Lloyd, wife of Henry Crofton Lloyd, of Collon, in the county Louth, quarterly, or as the same shall be received by my said heirs and executors, for and during the term of her natural life, and from and after the death of the said Almeda Julianna Lloyd, I bequeath the said sum with any interest accruing thereon from the date of the last payment to her upon trust to be divided equally between the children of the said Almeda Julianna Lloyd surviving at the time of her death, who shall attain the age of twenty-one years, and should the said Almeda Julianna Lloyd predecease me, I bequeath the said sum and any interest thereon upon trust for all and every of the children of the said Almeda Julianna Lloyd who shall attain the age of twenty-one years, in equal shares and proportions as tenants in common." Nothing turns directly upon this gift; but it is not unimportant as showing that the testatrix knew perfectly well how to indicate her intention when she meant to give a life interest.

She next disposes of the rest of the £6000 $2\frac{3}{4}$ per cent. Consols, and it is to be noted that she describes it as the "balance of the said stock," meaning of course what is left of the capital after withdrawing a part of it. "I bequeath to Elizabeth Anne Taylor .... the sum of £400: as to £200, portion of the said sum of £400, in trust for my sister Mary West, and as to the remaining £200 of the said sum in trust for my sister Margaret Walker." The will then goes on to dispose of certain pecuniary and specific legacies to other persons, these legacies numbering, as I count them, some forty-four distinct gifts to individuals and charities, some consisting of several separate and distinct subjects, and one and all given out and out. Then follows the disposition of the residue of the £6000, which it is to be again remarked she calls a "balance": "I direct that any balance remaining of the said £6000 $2\frac{3}{4}$ per cent. Government Consolidated Stock, as also whatever is due to me on foot of the two annuity policies I hold with the Liverpool, London, and Globe Insurance Company, in the name

of Eleanor Walker, after providing for the foregoing legacies and my funeral, testamentary, and other expenses connected with this my will, and the administration thereof, including the payment of duties to the Crown, shall be divided in three equal shares. I bequeath one such third share of same to the said Almeda Julianna Lloyd, another third I bequeath to the said Elizabeth Anne Taylor in trust for my said sister Eliza Mary West, and the remaining third I bequeath to the said Elizabeth Anne Taylor in trust for my said sister Margaret Walker, and I direct that any balance remaining in the hands of the said Elizabeth Anne Taylor, after the decease of the said Eliza Mary West on foot of the legacies hereinbefore bequeathed in trust for the said Eliza Mary West, shall go absolutely to the said Elizabeth Anne Taylor; and I further direct that any balance remaining in the hands of the said Elizabeth Anne Taylor, after the decease of the said Margaret Walker, on foot of the legacies hereinbefore bequeathed in trust for the said Margaret Walker, shall go to and be equally divided amongst the children of the before named Almeda Julianna Lloyd, who shall then be living." It is on this clause that the question turns. Do these words import that the previous absolute gift is after all only of a life interest, or that it is, as an afterthought, to be cut down to a life interest? Or do they merely imply that, in the event of the whole of the money given absolutely for the benefit of the legatees not being expended by them, or rather by their trustee for them, the balance not spent is to go over? If the former be the true meaning, then the legatees are not entitled to anything but the interest and dividends arising from the small sums bequeathed to them; if the latter, then the gift over is concededly void, either for uncertainty, or, as I should prefer to put it, for repugnancy. It was not once suggested, nor do I think it could be argued, that the original gift was not of the whole legacy, but of only so much thereof as in the discretion of the trustee should be reasonably needed to provide adequately for the requirements of the legatee, with a gift over of the rest. Whether such a gift could or could not be supported, and at present I do not see why it should not, it has not been contended that such is the meaning of the clause. The case is one either of a life interest strictly, or of an absolute estate.

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Apart from authority, it is clear that the testatrix never meant to give only a life estate. The word "balance" itself shows this; and indeed the testatrix uses that word in such a way as proves that it must mean the part of the *corpus* that remains after some other part of the *corpus* has been taken away. She speaks of "any balance remaining of the said £6000," "any balance remaining of the legacies hereinbefore bequeathed." The word *any* indicates an uncertainty as to whether there would be a balance or not, and, if there were, as to the amount of it. In the codicil she speaks of "the balance of the amount held by Mrs. Elizabeth Anne Taylor." All these instances show what is meant by balance, and that it is clearly not the whole of the *corpus*. In the codicil too she speaks of another balance—"the balance, if any, of the amount lodged in the Provincial Bank in our joint names for the benefit of Mrs. West," and disposes of that too as to £40 for Mrs. Taylor, after the death of Mrs. West, showing that she supposed that the trustee, or at least the settlor, of a fund held for another person, had power to dispose of the unspent part of it after the death of the cestui que trust.

I have no doubt whatever that this is precisely what Miss Walker thought she could do, and tried to do, in the present case. To construe the words so no doubt results in holding that the ultimate gift of the residue fails: but that result is owing to the testatrix having tried to do what the law does not allow, and such things frequently happen. It is the rule that effect must be given to the words used by the testator, and to all the words, if it be possible to do so, and that rule has led the Courts in many cases to interpret the language as conferring a life interest only, with a gift in remainder of the whole fund. Here I am perfectly sure that it would not be to effectuate, but to defeat, the intention, if I were driven to hold that the two sisters of Miss Walker were to have nothing but a life interest in their little legacies. I am quite sure she meant them to have the whole, at least if they needed it for their comfort.

Do the authorities then drive me to a course which would have so unfortunate a result as to defeat the leading intention of the testatrix? In my opinion they do not. The case on which most reliance was placed by Mr. Oulton in his able argument was the

well known case of *Constable* v. *Bull* (1). In that case John Constable by his will bequeathed as follows:—"First, I direct that all my just debts, funeral and testamentary expenses, be paid out of my estate as soon as convenient after my decease. I give, devise, and bequeath unto my dear wife, Mary Anne Constable, all and every my estate and effects, goods, chattels, houses, lands, moneys, securities for money due or falling due, every matter or thing whatsoever, and wheresoever the same may be at the time of my decease, for her sole separate use and benefit." He then goes on:—"I further give, will, and direct that, after the decease of my said wife, whatever remains of my said estate and effects shall go to be equally divided, share and share alike, between the following persons hereafter named, or so many of them as may be then living." The question was whether the widow became entitled absolutely to the property therein comprised, or whether, at her death, so much as then remained of the estate and effects of the testator was divisible amongst the persons designated by the will. The Vice-Chancellor says:—"The gift to the wife is universal in the first instance, and then follow the ulterior gifts, with the words 'whatever remains of.' The only question seems to be whether these three words have the effect of preventing the gift to the widow from being construed as a gift of a life interest; for, without these words, the subsequent bequests would have the effect of so reducing the interest given to the widow. There are several meanings capable of being rationally attributed to these words, which would be inconsistent with the construction giving to the widow the power of disposing of the property; and, as at present advised, I think that the other legatees have a substantial interest, and that such of them as survived the widow are entitled. This must be considered to be my opinion, unless I mention the case again this term." The report goes on:—"On the last day of term his Honor said, that he remained of the opinion which he had given; and a decree was made directing class inquiries, and the usual administration accounts, and reserving further directions and costs."

In that case there was one gift contained in two immediately consecutive clauses. Of course when property is given by a will

(1) 3 De G. & Sm. 411.

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to A B, and after his death to C D, A B can only take a life estate though the gift to him is in general terms. The difficulty in *Constable* v. *Bull* (1) arose from the use of the words "whatever remains." But in the opinion of the Vice-Chancellor these words were not strong enough to alter the construction of language which would have clearly given a life estate only, but for those words.

The present case has no resemblance to cases such as *Surnam* v. *Surnam* (2), in which there is an express power of disposition, with a gift of what shall be left, or so much as shall then remain, clearly pointing at what is not disposed of or appointed by virtue of the power. The rule is thus stated in Jarman, p. 333:—"A bequest of what shall remain or be left at the decease of the prior legatee, or of what the legatee is possessed of at the time of death, or of what he does not want, or does not spend, or of what he can transfer, or of what he can save out of his yearly income, or of what remains undisposed of, or is not disposed of by deed or will, or of the bulk of certain property, or a gift over of the whole legacy in case of the death of the prior legatee intestate, or a gift of a legacy to A, afterwards to go to B, is void for uncertainty." And again the editor says:—"But where property (whatever be its nature) is expressly limited to the first taker for life, there is not, it is believed, any case in which such expressions have been held to render the ultimate gift void, comprising as they then do the whole *corpus*." He then refers to *Cooper* v. *Williams* (3), *Constable* v. *Bull* (1), and *Bibbens* v. *Potter* (4). In *Bibbens* v. *Potter* (4) it is manifest that the codicil was intended to cut down the absolute gift contained in the will, being in fact *pro tanto* a revocation of it, though in the short judgment given in the case it is not expressly described as a revocation. The testatrix Emily Bibbens, having by her will given all her estates and effects, both real and personal, to her sister Anne Maria Bibbens, for her own use and benefit, by a codicil provided as follows:—"After the death of my sister Anne Maria Bibbens, I give, devise, and bequeath all property of mine, which may be then remaining (except our house and furniture at St. Mary's Church) to my brother William Bibbens, to William E. Potter,

(1) 3 De G. & Sm. 411.
(2) 5 Mad. 123.
(3) Pre. Ch. 71, pl. 64.
(4) 10 Ch. D. 733.

Charles Augustus Potter, and D. E. Selwig, to be divided in the following way." The question was whether Anne Maria Bibbens took an absolute estate, or only a life interest in the property, with a remainder to the other persons named. Vice-Chancellor Hall says:—"I am of opinion that this case is governed by the decision in *Constable* v. *Bull* (1), and that that is a rational construction of the two instruments. No doubt Emily Bibbens gave to her sister, by her will, an absolute estate, but by the codicil, which she directed to be taken as part of her will, and which I read with the will, she altered the provision which she had made for her sister. There was already an intention on her part that what was given by her will should go in another way, and therefore I hold that the codicil must have effect given to it." *Adams' Trusts* (2) is a case of the same sort, as is *Williams* v. *Pounden* (3), where the revocation was express. It is needless to do more than refer to *Re Thompson*; *Herring* v. *Barrow* (4), where there was an express gift to the legatee "for her own life."

But indeed this case does not depend upon decisions on other wills. There can be no such rule of law as that whenever "remainder," "rest," "residue," "whatever is left," etc., is superadded to a gift in terms absolute, the latter must be held to mean only a gift for life even if the context and scope of the will negative such a construction. It must be in each case a question of intention, to be gathered from the whole will, and I am clearly of opinion that, so far, if at all, as it depends upon authority, the present case is much nearer to *Perry* v. *Merritt* (5) than *Constable* v. *Bull* (1). That was also a decision of Hall, V.-C. Thomas Merritt gave to two trustees, the plaintiffs (whom he also appointed executors), their heirs etc., all his real and personal estate, upon trust, after paying his debts, funeral and testamentary expenses, and certain legacies, to pay the residue of his personal estate to his wife Elizabeth Merritt, "for her own absolute use and benefit." That expression does not occur in the will before me, but looking at the position of the gift it is quite the same as if it did occur—and the testator directed that "all the money (if any) that shall be remaining after

(1) 3 De G. & Sm. 411.
(2) 14 W. R. 18.
(3) 56 L. J., Ch. 113.
(4) 14 Ch. D. 263.
(5) L. R. 18 Eq. 152.

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payment of the just debts and funeral expenses of my dear wife Elizabeth Merritt, shall be equally divided between my said daughter Anne Griffiths, and her three children," and three other persons named, "share and share alike as tenants in common." Hall, V.-C., says: "I think that the principle of the case of *Watkins* v. *Williams* (1) is applicable to a case of this description"—that is that if a fund is given to a person absolutely, you cannot superadd a condition that so much as is not disposed of is to go over—"The whole of the residue of the personal estate was given to the wife for her own absolute use and benefit. She was, I think, at liberty to apply, dispose of, and to spend the capital for her own use and benefit, as she might think proper. The wife having that power to spend the capital, what does the other gift at the end of the will amount to? That gift is, in substance, one of the money remaining after the payment of the just debts of the wife, *i.e.* the money remaining after what the wife thought proper to spend; and the payment of her just debts. A gift of this kind is of so indefinite a character, and is so repugnant to the power of disposition given to the wife, that I cannot give effect to it. In *Henderson* v. *Cross* (2) there was a bequest of residue to the testatrix's father 'to spend both principal and interest, or any part of it, during his lifetime'; should he 'not spend the property,' then in trust for the testatrix's sisters; and it was held that the gift to the father was absolute, and that the gift over was inconsistent with it, and inoperative. The Master of the Rolls decided the case upon that ground, and in that case *Ross* v. *Ross* (3), in which a limitation over was held to be void, was referred to. I am of opinion that the widow was absolutely entitled."

In none of these cases was the word used the "balance," or "any balance." Conceding that too much stress must not be laid on the word "any," which occurs in several of the cases, it cannot be disregarded altogether. In all of these the Court was able to see an intention to create a life estate only, and so construed the document in spite of, and not in consequence of, inaccurate and inapt expressions, such as "the remainder," "the rest," "whatever is left," etc. In none of them was there a gift clear, definite, and

(1) 3 M'N. & G. 622. (2) 29 Beav. 216. (3) 1 Jac. & W. 154.

complete, of an absolute interest (as the first of these legacies is) surrounded and followed by numbers of other similarly clear and absolute gifts, sought to be controlled by a subsequent and remote clause forming no part of the original gift, but manifestly being something superadded to the previous complete disposition of the whole subject-matter. In *Constable* v. *Bull* (1) the Court held that there was no absolute gift at all, but that the words which, if alone, would have given an absolute interest, were by the immediate context shown to have meant only a life estate. That case cannot apply here. So where a testator by his will gives an absolute interest, and by a codicil revokes the gift, and substitutes a different one, the Court is driven to hold that the latter gift is not of an absolute interest, and thus to construe doubtful words as limiting an interest for life only. The same reasoning does not apply when both dispositions occur in a will. In that case there is no presumption that the latter is meant as a revocation of the former. I am clear that no authority and no principle can be found driving me to decide against the leading intention in this case; and I am of opinion that the legacies are absolute gifts of the entire equitable interests in the sums in question.

Solicitors for the executors of Eleanor Walker: *Casey & Clay.*
Solicitors for the plaintiffs:-*Hayes & Sons.*
Solicitor for Margaret Walker: *C. H. Cochrane.*
Solicitor for Eliza Mary West: *Baker.*

W. L.

(1) 3 De G. & Sm. 411.

*M. R.*
1895.
Nov. 8, 9, 13.
Dec. 4.
*Appeal.*
1896.
April 28, 29, 30.
June 23.
1897.
Jan. 21, 22, 25.
March 1.

## CONOLLY *v.* GORMAN AND OTHERS.

(1894. No. 690.)

*Tithe rentcharge—2 & 3 Wm. 4, c. 119—1 & 2 Vict. c. 109—Lands subject to tithe rentcharge sold to different purchasers in severalty—Extent of liability—Arrears recoverable—Infancy—Statute of Limitations—Common Law Procedure Act, 1853, s. 20—Vesting order—Mis-statement—Indemnity—Irish Land Commission—44 & 45 Vict. c. 71, s. 2.*

On the 24th of November, 1823, a statutable composition for all tithes payable out of certain titheable lands was fixed; and this composition was afterwards assessed and applotted on each parcel of the titheable lands. One third of the amount assessed and applotted on the glebe lands of the parish of D. (portion of the titheable lands) was payable by the vicar of the parish to the predecessors in title of the father of the plaintiff.

Under the Tithe Rentcharge Act the glebe lands of the parish of D. became liable to and chargeable with the annual payment of a tithe rentcharge of £8 13*s* 1*d.*, which represented the vicarial tithe, the right to which became vested in the father of the plaintiff, and was duly paid to him by the vicar of the parish up to 1869, and afterwards by the Commissioners of Church Temporalities (in whom the glebe lands were then vested) until 1876. On his father's death in 1876 the vicarial tithe vested in the trustees of his will in trust for the plaintiff, who was a minor.

The tithe rentcharge was paid to the trustees of the will up to and ending the 1st of November, 1877, since which date no further payment was made. In 1878 each of the defendants became entitled to an estate or interest in the glebe lands equivalent to a perpetual estate or interest as defined by 1 &2 Vict. c. 109, and each of them held a portion of the lands in severalty. The plaintiff attained age in 1891, and in 1894 instituted an action against the defendants, claiming sixteen years' arrears of tithe rentcharge, and a declaration that the entire rentcharge and the arrears thereof were well charged on the glebe lands of the parish of D. and upon all the estate and interest of the defendants in the lands:—

*Held* (by the Court of Appeal, affirming the decision of the Master of the Rolls), that the plaintiff was entitled to one tithe rentcharge out of the lands, and that he was not bound to look to each separate holder of a part of the lands to ascertain the amount payable out of each portion, or to proceed against the separate holders for several rentcharges, but that only six years' arrears of the tithe rentcharge was recoverable by the plaintiff.

By vesting order, dated 1878, the Commissioners of Church Temporalities

vested a portion of the glebe lands in the defendants the Representative Church Body. The vesting order stated that the part of the glebe lands conveyed was liable to six shillings tithe rentcharge. In 1885 some correspondence took place between the Representative Body and the Irish Land Commission (as representing the Church Temporalities Commissioners) as regards the fact that the lands were charged with tithe rentcharge exceeding the amount mentioned in the vesting order, but no further steps were taken in reference to the matter until 1894, when, in the action brought by the plaintiff, a third party notice was served by the Representative Church Body on the Land Commission claiming indemnity from them against payment of any sum in excess of the six shillings mentioned in the vesting order.

*Held*, by the Court of Appeal, reversing the decision of the Master of the Rolls, that the Irish Land Commission were bound to indemnify the Representative Church Body against payment of any tithe rentcharge in excess of six shillings per annum.

TRIAL OF ACTION.

The plaintiff claimed a declaration that the annual tithe rentcharge, and the arrears thereof mentioned in the statement of claim were well charged upon the glebe lands of the parish of Drumholm, in the diocese of Raphoe, and county of Donegal, containing 690 acres or thereabouts, and comprising the townlands of Drumchory Glebe, Murragh Upper Glebe, Drumbriston Glebe, Rathtinny and Drummanus Glebe, and upon all the estate and interest of the defendants in said lands.

The defendants were proved to be owners of lands charged with the tithe rentcharge.

The statement of claim also asked for the payment of £138 9*s.* 4*d.*, the arrears of the tithe rentcharge claimed, and that in case of non-payment a receiver might be appointed over the said lands.

The title of the plaintiff as set out in the statement of claim was proved by the documents put in evidence in the action. It stated as follows:—By letters patent dated 9th April, in the twentieth year of the reign of James I., King James I. granted and confirmed unto Henry Folliott Knight, Lord Folliott of Ballyshannon, his heirs and assigns for ever, amongst other hereditaments "the Rectory of Drumhynne, otherwise Drumhoaine, otherwise Tirehugh, that is to say, one-third part of all the tithes as well great and small, oblations, obventions, and two parts of all mortuaries yearly growing, renewing, or issuing of, in, or from, all lands, tenements,

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and hereditaments of and in the territory of Tirehugh in the said parish of Drumhynne, otherwise Drumhoaine, otherwise Tirehugh, with the appurtenances, in the county of Donegal." These hereditaments, that is, one-third of the tithe, afterwards became vested in Thomas Conolly (the elder), his heirs and assigns; and by indenture of lease, dated 13th August, 1760, the said Thomas Conolly demised to the Rev. William Major all the said hereditaments therein described as "all that and those the vicarial tithes arising, and that may arise out of the parishes of Drumholm and Donegal, aforesaid, being one-third part of all the great and small tithes of all ecclesiastical fees or dues of what nature or kind soever, which shall or may become due out of the said parishes," for the lives and term of years therein mentioned, at the yearly rent of £120 of the then Irish currency; and by indenture dated 12th May, 1790, three lives therein mentioned were substituted for the lives mentioned in the said first-mentioned indenture of lease. Thomas Conolly (the elder) died in 1803, and by his last will and testament, dated 27th May, 1799, he devised all his estates (which included the reversion expectant on the determination of the leases previously mentioned) to trustees therein named for payment of his debts, and subject to that trust, to the use of his widow, Lady Louisa Augusta Conolly, for life, with remainder to his grand-nephew Edward Michael Pakenham, for life, he taking the surname of Conolly, with remainder to the first and other sons of the said Edward Michael Pakenham in tail male. The said Louisa A. Conolly entered into possession of said hereditaments and premises under the trusts of said will, and so continued until the date of her death in the year 1821, and the said Edward Michael Pakenham (otherwise Conolly) then entered into possession thereof, and by indenture dated 30th October, 1830, the then surviving trustees of the will of the said Thomas Conolly (the elder), viz. the Earl of Clancarty, and the Hon. Sir Thomas Pakenham, conveyed the trust estates to the said Edward Michael Pakenham, otherwise Conolly, who was then tenant for life in possession thereof.

On the 24th November, 1823, a statutable composition for all tithes within the parishes of Drumholm and Donegal was made, and its entire amount was fixed at the sum of £796 8*s.* 10*d.* (late Irish

currency) by a certificate of that date. This composition was afterwards assessed and applotted on each parcel of the titheable lands within said parishes; the total amount so assessed and applotted on the glebe lands of the parish of Drumholm was £37 9*s.* 11*d.* (late Irish currency), one-third of which was payable by the vicar of the parish to John Hamilton and John Miller, in whom the interest of the lessees in said lease of 13th August, 1760, was then vested.

The statement of claim then alleged that by virtue of the Tithe Rentcharge Act the said glebe lands of the parish of Drumholm, in the diocese of Raphoe, and county of Donegal, became liable to and charged with the annual payment of one entire sum or rentcharge of £8 13*s.* 1*d.* (present currency), payable to the lessees under said lease of 13th August, 1760, in two equal instalments, on the 1st May and 1st November in each year, being three-fourths of one-third of the amount of the tithe composition.

Edward Michael Pakenham, otherwise Conolly, died in the year 1849, and upon his death his eldest son, Thomas Conolly (the younger), entered into receipt of the rent reserved by the lease of 13th August, 1760, as tenant in tail under the will of Thomas Conolly (the elder). By disentailing assurance dated the 26th December, 1850, duly enrolled in Chancery, Thomas Conolly (the younger) duly barred the entail in all said hereditaments, and thereupon became entitled to an estate in fee-simple in same. The lease of 13th August, 1760, as extended by the indenture of 1790, expired in or about the year 1860, and thereupon Thomas Conolly (the younger) entered into receipt of the tithe rentcharge of £8 13*s.* 1*d.* per annum, which was duly paid to him by the vicar of the parish of Drumholm up to 1869, and afterwards by the Commissioners of Church Temporalities in Ireland until the date of his death.

Thomas Conolly (the younger), died on the 10th August, 1876, and by his last will and testament, dated the 8th of June, 1876, devised all the manors, messuages, lands, hereditaments, and premises, over which he should, at his death, have any power of disposition, unto the trustees named in his will, their heirs, executors, and administrators, to the use of the plaintiff, his eldest son, in tail male, with remainders over. The annual tithe

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rentcharge of £8 13*s.* 1*d.* was paid to the trustees of the will by the Commissioners of Church Temporalities up to and ending the 1st November, 1877, since which date no payment thereof was made. The plaintiff was at the date of his father's death a minor, and he attained the age of twenty-one on 1st September, 1891. The statement of claim alleged that he became thereupon entitled to receive the said annual tithe rentcharge of £8 13*s.* 1*d.* and all arrears of same then due. It then stated that the defendants "have, and at the times respectively, when all the gales of tithe rentcharge sued for in this action became due, had the first estate of inheritance in the said glebe lands charged with the annual tithe rentcharge of £8 13*s.* 1*d.*, or such other estate or interest therein, equivalent to a perpetual estate or interest, as defined by the statute 1 & 2 Vict. c. 109, as under and by virtue of the said statute rendered them liable to the payment of said tithe rentcharge and all arrears thereof." The last paragraph alleged that on 1st May, 1878, one half yearly gale of tithe rentcharge became due and owing to the plaintiff, amounting to the sum of £4 6*s.* 6½*d.*, and that on 1st November, 1878, another half yearly gale of same amounting to the said sum became due, and that on every 1st May and 1st November in each year thenceforward down to 1st November, 1893, a half yearly gale of same, amounting to the same sum, became so due to the plaintiff as aforesaid, and that all said sums, being sixteen years' arrears of tithe rentcharge, and amounting to the sum of £138 9*s.* 4*d.* were still due and owing to the plaintiff by the defendants.

Each of the defendants became the owner of an estate in fee-simple, or of such other perpetual interest as defined by 1 & 2 Vict. c. 109, of portion of the glebe lands, and held the different portions in severalty. They all took defence to the action, and a third party notice was served on the Land Commission by the defendants the Representative Church Body and also by some others of the defendants, on the ground that the Land Commission were liable to make compensation to these defendants in the event of these defendants being held liable to the plaintiff in the amount claimed by him. The defence of the Representative Church Body (which raised all questions relied on by the other defendants respectively in their defences), stated that in 1878 the Commissioners of

Church Temporalities in Ireland (now represented by the Irish Land Commission), pursuant to the powers vested in them by the Church Act, 1869, proposed to sell to these defendants the ecclesiastical residence, garden, and curtilage, together with certain additional land of the benefice of Drumholm, in the diocese of Raphoe, and for this purpose furnished to these defendants certain terms of purchase, in which it was stated that the said lands were subject to six shillings a-year tithe rentcharge, and a reduction of £6 6*s.*, being twenty-one times the amount of said tithe rentcharge of six shillings a-year, was thereby made from the purchase-money. That by vesting order, dated 8th August, 1878, the said ecclesiastical residence, garden, and curtilage, containing 1 acre and 2 roods statute measure, were vested by the said Commissioners in these defendants, in consideration of the sum of £257 paid to said Commissioners by these defendants, and that by another vesting order of the same date the said additional land of the said benefice of Drumholm, containing 22 acres and 12 perches (which formed part of the townland of Drumbriston Glebe), was in consideration of the sum of £389 12*s.* 9*d.* paid to the said Commissioners, vested in these defendants, subject in conjunction with the remainder of the said glebe lands of the benefice of Drumholm to an annual tithe rentcharge of six shillings per annum. Then they submitted that upon the true construction of the statute 1 & 2 Vict. c. 109, they were only liable to pay a tithe rentcharge in respect of their estate and interest in the said lands and premises comprised in the said vesting orders according to the quantity of land comprised in their said estate and interest.

In the alternative they submitted that they were liable in conjunction with the residue of the lands comprised in said townland of Drumbriston Glebe, in respect of the said lands and premises so vested in them as aforesaid, to a tithe rentcharge of £1 10*s.* 9*d.* and no more, being the amount payable to the plaintiff in respect of the applotment on the said townland with a right of contribution and indemnity over against the defendants Arthur Hamilton Foster and James C. Shaw, and any other of the defendants in this action who were the owners of the responsible estate in the residue of the lands comprised in

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said townland. They further submitted that, in the event of their being held liable to said tithe rentcharge of £8 13*s.* 1*d.*, they were entitled to contribution and indemnity from all the other defendants in respect of any sum in excess of their proper proportion of the said tithe rentcharge.

They further stated that prior to the institution of the action no claim had ever been made against them for any tithe rentcharge whatsoever, either by the plaintiff, or by the trustees of the will of Thomas Conolly the younger, or by any other person; and that no payment or acknowledgment was ever made or given by them to any person in respect of any tithe rentcharge; and they submitted that the plaintiff was, in any event, only entitled to recover six years' arrears of tithe rentcharge.

They also submitted that the rentcharge claimed was not one indivisible rentcharge, but was only portion of a rentcharge, and that therefore the action could not be maintained.

The ninth paragraph of their statement of defence was as follows:—

"These defendants further say that on the 8th December, by leave of the Court, they served a third party notice on the said Irish Land Commission, who now represent and are the successors of the said Commissioners of Church Temporalities in Ireland, claiming to be indemnified by them against payment of any tithe rentcharge in excess of six shillings per annum, being the amount of tithe rentcharge stated in said vesting order, and subject to which the said lands and premises were vested in them by the said Commissioners as aforesaid, and these defendants submit that in case they are held liable to pay any tithe rentcharge in excess of six shillings per annum they are entitled to be indemnified by the said Irish Land Commission to the extent of such excess."

The fact that the lands were charged with tithe rentcharge exceeding the amount mentioned in the vesting order of 1878 was known to the Representative Church Body in 1885, when some correspondence took place between their secretary and the secretary of the Irish Land Commission as to the mistake or mis-statement that the lands vested by the vesting orders in the Representative Church Body were vested in them subject to six shillings tithe rentcharge only. On the 15th of July, 1885, Mr. Godley, the

secretary of the Land Commission, wrote as follows:—"I am directed to acknowledge the receipt of your letter of the 13th inst., and to inform you that the townland of Drumbriston Glebe is subject, by the Applotment Book of the parish, to £1 10*s.* 9*d.* impropriate tithe rentcharge. The Church Commissioners, when vesting a portion (about 21 acres) of this townland in the Representative Church Body, sold it subject to six shillings, as a probable liability in respect of their rentcharge, having regard to the quantity of land vested."

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Nothing further was done in reference to the matter by the defendants the Representative Church Body until the service of the third party notice on the Land Commission, as stated in the ninth paragraph of the statement of defence of the Representative Church Body.

*The Right Hon. C. H. Hemphill, Q. C.*, and *Cherry*, for the plaintiff.

*W. M. Jellett*, for the defendants the Representative Church Body.

*Matheson, Q.C.*, and *D. M'Carthy Mahony*, for the Irish Land Commission.

*W. C. Stubbs, C. H. Crookshank, J. Cooke*, and *Gallagher*, for the other defendants.

The arguments were the same as those on the hearing in the Court of Appeal, reported *infra*.

THE MASTER OF THE ROLLS (having stated the pleadings) proceeded as follows:— Dec. 4.

It is necessary to consider the policy of the different Acts of Parliament in reference to this matter.

Under Goulburn's Act, 4 Geo. 4, c. 99, the "composition" in lieu of tithe was one composition in respect of all the tithe in a parish. That appears clear from the whole scope of the Act and in terms in sect. 16, which is as follows:—"And be it further enacted, that it shall be lawful for the said two Commissioners so respectively appointed on behalf of the said several parties, and such Commis-

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sioners are hereby authorized and empowered, to agree upon and to ascertain and fix the amount of the yearly sum of money to be paid to the incumbent, or any other person or persons, or body politic or corporate or collegiate, or corporation, entitled to any tithes, rectorial or vicarial, prædial, personal or mixed, in the parish where such Commissioners shall be so appointed, as a composition for and in satisfaction of all such tithes; and that such amount shall be so calculated upon an average of all the sums paid, or agreed for or adjudged to be paid, in such parish on account of tithes during the seven successive years preceding the first day of November, 1821; and if it shall appear to the said Commissioners that the sums which have been paid or agreed for during such seven years have not been an adequate compensation for the tithes of the several articles on account of which such sums have been paid or agreed for, it shall be lawful for the said Commissioners in such case to add to the amount of such average any sum not in any case exceeding in the whole one-fifth part of the amount of such average: provided always that if it shall happen that any land subject to tithes in any such parish shall during such period of years have been held and possessed by any person entitled to the tithes, or to the receipt of the tithes of such land, or in any manner so that the tithes of such land shall not have been actually paid, nor agreed for, nor adjudged to be paid during such period, then and in every such case the annual value of the tithes of such land shall be estimated by the said Commissioners according to the best information which they can obtain; and in any other case where it shall happen that the tithes of any land shall not have been paid, nor agreed for, nor adjudged during such period, it shall be lawful for the said Commissioners to fix and ascertain the value of the tithes of such land in each year of the said period, according to the payments made for tithes of the like kind in the same or any adjoining parish, &c."

The certificate ascertaining the amount of the composition was to state "the amount of the true and just composition which shall thenceforth be paid in satisfaction of *all* tithes in such parish, and in what proportions such composition shall be paid or divided to or amongst the party or parties entitled to such tithes, or any particular share or proportion of such tithes" (sect. 25). And

the form of the certificate given in schedule B of the Act is as follows:—"We, A B and C D, Commissioners duly appointed . . . do hereby certify that the true and just amount of composition for all tithes whatever within the said parish is . . . pounds by the year." And sect. 31 makes the certificate conclusive evidence of the amount of the composition. Within four months after the certificate of composition the Commissioners are to "assess and applot" upon all land not "tithe-free within the parish according to the true annual value of the several lands" (sect. 34). The amount of composition, and of the several portions thereof assessed and applotted is to be a charge on the land specified in such assessment and applotment during the continuance of such composition, such charge not to exceed one year's amount (sect. 38).

The Act is only to be in force for twenty-one years, and the composition may be varied from time to time according to the price of grain (sect. 43).

Stanley's Act (2 & 3 Wm. 4, c. 119) was passed making permanent the temporary provisions of Goulburn's Act, and there is a very good summary of its effect in Mr. Hamilton Smythe's work on the Law of Landlord and Tenant, p. 537:—"The 2 & 3 Wm. 4, c. 119 (Stanley's Act) made the composition perpetual, general, and compulsory, subject however to variation, and exempted tenants at will, or from year to year, from payment of the composition to the tithe owner, throwing the liability to the payment, in the first instance, to the tithe owner, upon the first estate or interest greater than a tenancy from year to year. This statute also took away the right of distraining for tithe composition, except where the persons liable to the payment, in the first instance, to the tithe owner, were themselves in occupation; and it enacted, that in all cases after the passing of the Act, where any land should be set, or let, or demised in Ireland, the lessee or tenant should hold such land free from the payment of tithes or composition for tithes, and all contracts, covenants, and agreements to the contrary, howsoever made, should be null and void, excepting the case of leases renewed under covenants. This Act also enabled landlords whose tenants were liable to the payment of tithe composition, to undertake for the payment of same, with

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the advantage of receiving a bonus of 15 per cent. for so undertaking."

Then followed the Tithe Rentcharge Act (1 & 2 Vict. c. 109). The policy of this statute was "to abolish compositions for tithes in future, and to substitute rentcharges in lieu thereof." It is manifest that although the Act does not describe the rentcharges which it was its object to establish as perpetual, and does not use words of limitation in describing them, they must have been designed to be in their very nature perpetual and not terminable charges. Their incidence shows this quite clearly, apart from the fact that they are substituted for tithes, which were of course assumed to last for all time (sect. 9).

The seventh section is the one on which almost the whole of this question directly depends. It is as follows:—

"And be it enacted, that every parcel of land charged with or in respect whereof the said tithe compositions or any applotment or assessment thereof would have been payable if this Act had not been passed, shall be and become severally liable to and charged with the payment of an annual sum or rentcharge equal to three-fourths of the annual amount of such tithe compositions, and that such rentcharges shall, except as hereinafter excepted, be payable by the party having in such lands respectively the first estate of inheritance, or other estate or interest equivalent to a perpetual estate or interest as hereinafter defined, under which, or derived wherefrom, there shall be no such perpetual estate or interest, according to the quantity of such lands comprised in each such estate or interest: provided always, that any landlord who shall have undertaken the payment of any composition for tithes under the provisions of the hereinbefore recited Act of the second and third years of the reign of his late Majesty shall, for and during the continuance of his estate and interest in the lands charged with the rentcharge payable in lieu of such composition, be liable to the payment of such rentcharge, provided he has an estate not less than an estate of inheritance in such lands; and that such rentcharges shall take effect from the 1st day of November last past, and that the first payment of such rentcharges shall become due on the 1st day of November in this present year, and be then paid by one entire payment; and that the said rentcharges

accruing due in each succeeding year shall be payable by two equal half yearly payments, one whereof to become due on the 1st day of May, and the other on the 1st day of November, in each such year: provided always, that although such tithe compositions may have been separately applotted or assessed upon different portions of such lands, the lands comprised in each such estate or interest shall be charged with the annual payment as aforesaid of one entire sum or rentcharge equal to three-fourths of the gross annual amount of such several applotments or assessments: provided also, that the amount of such rentcharges shall be computed on the gross amount of such tithe compositions as stated in the certificates and applotment books thereof respectively, without regard to the deduction of £15 per centum, claimable by persons undertaking the payment of such tithe compositions under the provisions of the above recited Act of the second and third years of his late Majesty's reign; provided always, that all certificates and applotment books of such compositions shall be deemed and taken as valid and effectual for the purpose of ascertaining the rentcharges to be paid in lieu thereof, save so far as the same may be varied in pursuance of the provisions in this Act, in which case the rentcharges shall be ascertained by such amended certificate or applotment book."

But though the rentcharge is itself perpetual, and though the Act contains no provision for creating new rentcharges from time to time, and no machinery applicable to any such purpose (as was the case in respect of tithe composition under the former Acts), it does contain a provision in special cases for modifying the amount of the charge according to the price of grain, though this is to be done in a mode differing from that which applies under Goulburn's or Stanley's Acts (s. 32).

From all this it appears to be plain that no new, separate, or distinct rentcharge can be created under the Act, except in the one case expressly provided for by the clause in sect. 7 on which the plaintiff relies.

It is of course open to the tithe owner if possessed of a sufficient estate in the tithe rentcharge to divide it in any way he may think right. But as between the owner of the tithe rentcharge and the lands on which it is charged, it is and remains one

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rentcharge. Similarly, it is of course open to the owners of the titheable lands to agree among themselves as to the payment of the tithe rentcharge in any proportions they may think fit; and, if possessed of a sufficient estate, to charge it upon their respective holdings in such shares as they may agree on. It is not in their power, however, by any arrangement *inter se* to exonerate any part of the land from ultimate liability to the whole charge. But the Act contains an exception. In one defined case, what would have otherwise been several rentcharges are by the statute consolidated so as to form but one, even though the composition had previously been separately applotted on different portions of the lands charged. This is the provision:—"Provided always, that although such tithe compositions may have been separately applotted or assessed upon different portions of such lands, the lands comprised in each such estate or interest shall be charged with the annual payment as aforesaid of one entire sum or rentcharge equal to three-fourths of such several applotments or assessments."

This is applicable to "the lands comprised in each such estate or interest," that is, the lands in respect of which there was at the time when the Act came into operation an owner having in such lands the first estate of inheritance or other estate equivalent to a perpetual interest as defined by the Act. I say at the time when the Act came into operation: because the rentcharge was to be ascertained by the existing certificates and applotment-books save as varied under the provisions of the Act itself (sect. 7), and the variations in amount and incidence are provided for by sects. 13, 14, and 15.

These sections are only temporary and refer to the alteration of composition for tithes on appeal in case of fraud or misrepresentation, such appeal to be taken within a defined time. I may refer to the preamble to sect. 13, which is as follows:—"And whereas in cases where the said compositions for tithes have been established by a sole Commissioner appointed by the Lord Lieutenant, in pursuance of an Act passed in the second and third years of the reign of his late Majesty King William the Fourth, intituled 'An Act to amend three Acts passed respectively in the 4th, 5th, and in the 7th and 8th years of the reign of his late Majesty

King George the Fourth, providing for the establishing of compositions for tithes in Ireland, and to make such compositions permanent' it is just and expedient, with a view to a final and satisfactory settlement of the amount of the said compositions for tithes, and the rentcharges payable in lieu thereof, that appeals should be allowed, &c."

The effect of this proviso in sect. 7 was considered by Law, C., in *Commissioners of Church Temporalities* v. *Grant* (1). He says: "Speaking generally, the practical effect of this clause was, I apprehend, to give to the tithe composition owner one single rentcharge, charged upon and payable out of the entire of a landlord's estate, in lieu of a number of compositions, each of which had been charged upon and payable out of only a small part of the land composing that estate. Thus, taking the case of a fee-simple estate of one thousand acres occupied by fifty tenants: each of the fifty separate parcels of land so held was, up to the passing of the Act of 1838, charged for ever with a distinct and separate annual payment by way of composition for tithe. But, by the Act of 1838, all these fifty small annual sums (or rentcharges), each charged upon its own small piece of land, were 'abolished'; and in place of them one substantial rentcharge was created, charged upon the entire one thousand acres constituting the estate. This was, it must be admitted, a very important change, and renders it, I think, extremely difficult to regard the new rentcharges thus created as even substantially identical with the groups of abolished composition rentcharges which they replaced. The plaintiffs' counsel have insisted, and rightly, as I think, that those compositions were, while they were suffered to exist, as truly and strictly rentcharges as the new rentcharges which succeeded them. They were, as we have seen, charged on the *fee* of each parcel of land out of or in respect of which they were payable, and were recoverable by *distress* as well as action. The personal liability to pay had been transferred by Lord Stanley's Act from the occupiers, if only tenants at will or from year to year, to the holder of the next superior estate for the time being, without in other respects affecting the rents or compositions themselves as charges upon the land. And if the only

(1) 11 L. R. Ir. 453.

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object of the Legislature in passing the Act of 1838 had been to make a further change in this personal liability to pay, and to reduce the amount in each case by one-fourth, this might easily have been done by a simple enactment to that effect, leaving the old charges which had been expressly created as, and were therefore in fact, compositions, in other respects unaffected, and therefore still subsisting. This course, however, was not taken. The rentcharges which had been expressly created as, and were in fact 'compositions,' were distinctly and absolutely 'abolished,' and instead of them new rentcharges were created, payable to the same persons, and measured, no doubt, by reference to the amounts of the abolished compositions, but having no further connexion with or relation to them; and as a general rule, each new rentcharge equal in amount to three-fourths of a whole group of the old compositions, and charged upon an entire estate, instead of each composition being charged on each separate holding comprising it." Then follow further observations in reference to the case before the Court. And the reason for the change is stated in the same case by Palles, C.B., at page 467. He says:— "Again, although the composition may have been separately applotted upon different parcels of land, the lands comprised in each estate equivalent to a perpetual estate (as defined by the Act) are charged with but one entire rentcharge. Why is this? Because as the liability is transferred from the occupier to the owner, the reason which therefore existed of having a separate rentcharge in respect of the lands in the hands of each occupier had ceased."

No question on the proviso directly arose in that case, and it is not noticed in the judgment of FitzGibbon, L.J., nor in that of Lord Selborne, who delivered the decision of the House of Lords, in 10 Appeal Cases, 14.

The case for the plaintiff here is that he comes within the proviso: and that he is entitled to one rentcharge equal to the one-third of the three-fourths of the composition applotted upon the glebe lands of the parish of Drumholm. The total of the aggregate applotments upon those glebe lands was £37 9*s.* 11*d.* (late Irish currency). Two-thirds of this consisted of rectorial tithe, and belonged to the incumbent of the parish. Of course this was Church property;

and the tithe rentcharge in respect of it (that is three-fourths) passed into the hands of the Church Temporalities Commissioners on the disestablishment of the Church. The vicarial tithe, equalling one-third of that now represented by three-fourths of the amount of the applotments, is vested in the plaintiff, and his title has been clearly proved to whatever rentcharge or rentcharges now represent the vicarial tithe. The defendants are severally purchasers of different portions of the glebe lands of the parish; and I am of opinion that the plaintiff is entitled to one tithe rentcharge out of the lands, that he is not bound to look to each separate holder of a part of the lands to ascertain the amount payable out of each portion or to collect several tithe rentcharges from the separate holders. I think that this is the very case that comes within the proviso, and that it was enacted to meet it.

The next question is as to the amount of arrear now recoverable by the plaintiff.

On this question the 42nd section of the Act of 3 & 4 Wm. 4, c. 27, in terms applies. This is a rent in the extended sense: *Commissioners of Church Temporalities* v. *Grant* (1); and if authority were wanting in reference to the arrears so far as they are a charge upon the lands, it is to be found in the case of *Ecclesiastical Commissioners* v. *Sligo* (*Marquis of*) (2), the decision in which, of course, binds me as a Court of first instance, even if I disapproved of it, which I do not.

That case was heard before Lord Chancellor Brady. It was only a petition, but it was fully argued by Mr. Martley with Mr. Fetherston for the petitioners. The counsel on the other side were Mr. Brewster and Mr. Francis Fitzgerald. They were stopped by the Court when about to reply, but that does not weaken the effect of the decision. The report of the judgment is only in the result, and it was held that only six years' arrears of tithe rentcharge could be recovered.

But Mr. Hemphill urges that the infancy of the plaintiff (he came of age in September, 1891) prevents the statutory bar from running. I do not think it does. There is no section to which I have been referred that seems to apply; and the opinion of the editors of Mr. Shelford's Real Property Statutes, following Sugden's

(1) 11 L. R. Ir. 430. (2) 5 Ir. Ch. R. 46.

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Vendors and Purchasers, is the other way (Shelford, p. 190). They say :—"The 42nd section contains no exception in favour of persons under disabilities; and if the Act be construed literally, infants and lunatics, and other persons under disabilities, will only be enabled to recover six years' interest."

Mr. Hemphill, however, contends that, even if this be so as regards the right to proceed against the lands, the personal remedy is not barred till the expiration of twenty years. In England he admits the law would be the other way; but he contends that section 20 of the Irish Common Law Procedure Act of 1853 makes a difference in this country. Even if this were the case of a personal covenant to pay the rentcharge (which it is not), I think that the reasoning in the cases of *Sutton* v. *Sutton* (1), *Fearnside* v. *Flint* (2), and *Hughes* v. *Coles* (3), goes to show that the period of limitation must be the same in the present case whether the remedy is sought against the lands or on the personal liability.

In *Sutton* v. *Sutton* (1) it was sought to escape the limitation imposed by the Real Property Limitation Act of 1874, as regards a covenant for the repayment of the money contained in a mortgage deed, and it was held that the terms of the Act expressly applied and included the case of the personal remedy on the covenant to pay the debt. In *Fearnside* v. *Flint* (2) the same question arose in a different way, the mortgage debt being secured by a collateral bond, and it was held that there was no difference between a covenant contained in a mortgage deed and a collateral bond given at the same time as the mortgage.

*Hughes* v. *Coles* (3) raises the question on the 10th section of the Act of 1874, as to the effect of the statute on an express trust, and the Court recognised the rule laid down in *Sutton* v. *Sutton* (1) and *Fearnside* v. *Flint* (2), and held that the remedy was the same as if there had been no trust.

The words of the 42nd section are "no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be re-

(1) 22 Ch. D. 511. (2) 22 Ch. D. 579. (3) 27 Ch. D. 231.

covered by any distress, action, or suit, but within six years after the same respectively shall have become due."

But it is not clear to me that sect. 20 of the Common Law Procedure Act (Ireland), 1853, would in terms apply to the case.

The 20th section of the Common Law Procedure Act, 1853 (16 & 17 Vict. c. 113), commences thus:—"All actions for rent upon an indenture of demise, all actions upon any bond or other specialty, or upon any judgment, statute staple, statute merchant, or recognizance, shall be commenced and sued within twenty years after the cause of such actions, or suits, or the recovery of such judgment, but not after."

This action is not for rent "upon an indenture of demise"; nor does it fall within any other head of the first part of the section (twenty years limitation), if it be not "upon any bond or other specialty." No doubt an Act of Parliament may create a specialty debt; but I cannot regard this as an action *upon* an Act of Parliament; nor do I think that the security in question is a "specialty" within the meaning of this section, which appears to contemplate a specialty *ejusdem generis* with a bond. An indenture of demise is a specialty. So are the matters which follow (judgment, statute staple, statute merchant, recognizance, etc.). From the position of the words "other specialty" in the middle of the enumeration of things, all of which are in one sense specialties, it would seem that the specialty in question is to be interpreted as a specialty contract, or at least an obligation in the nature of a specialty arising *inter partes*. The specific mention, too, of "rent upon an indenture of demise" would seem to exclude rentcharges not so arising, unless clearly included in other general or specific words. I think the period of limitation applicable is six years, without any extension of that period owing to infancy.

There remains the question between some of the defendants on the one hand, and the Land Commission. It is stated in the defence of the Representative Church Body. Paragraph 9 of their defence is as follows:—These defendants further say that on 8th December, by leave of the Court, they served a third party notice on the said Irish Land Commission, who now represent and are the successors of the said Commissioners of Church Temporalities in Ireland, claiming to be indemnified by them against payment

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of any tithe rentcharge in excess of six shillings per annum, being the amount of tithe rentcharge stated in said vesting order, and subject to which the said lands and premises were vested in them by the said Commissioners as aforesaid, and these defendants submit that in case they are held liable to pay any tithe rentcharge in excess of six shillings per annum, they are entitled to be indemnified by the said Irish Land Commission to the extent of such excess."

By vesting order dated 8th August, 1878, the ecclesiastical residence of Drumholm, in the diocese of Raphoe, was duly vested in the Representative Church Body, and by a second vesting order of the same date, after reciting that the Representative Church Body had applied to the Commissioners of Church Temporalities to vest in them a further portion of the glebe lands of the benefice as being usually occupied with the ecclesiastical residence, and after other recitals, "it was ordered by the Commissioners of Church Temporalities in Ireland, pursuant to powers vested in them by the Irish Church Act, 1869, and in consideration of the sum of £389 12*s.* 9*d.* . . . that all that and those that part of the glebe lands of the benefice of Drumholm, in the diocese of Raphoe, containing 22A. 0R. 12P. or thereabouts . . . do vest in the said Representative Church Body, and the said Commissioners do hereby vest same accordingly, subject in conjunction with the remainder of said lands to an annual tithe rentcharge of 6*s.* per annum."

Now no doubt a mistake was made in regard to the rentcharge, though how it arose is in fact unexplained. The question was raised ten years ago, when a correspondence took place about it; and on that occasion (15th July, 1885), Mr. Godley for the Irish Land Commission, stated that the six shillings had been arrived at as a "probable liability in respect of this rentcharge." Nothing has been since done about it but the service of this third party notice. Can a claim for indemnity be sustained? That is, is there a subsisting right to compensation in respect of what turns out to have been an incorrect statement which entered into the contemplation of both parties when the contract was made?

*Per se* the execution of a conveyance will not necessarily prevent a claim for compensation from being entertained if the original contract was procured by misrepresentation or by a warranty

of something in fact untrue. The claim for compensation, however, after conveyance executed, must depend upon the same principles as would be applicable to an action for misrepresentation or a breach of warranty; and indeed this third party proceeding is nothing more than that. The case of *Phelps* v. *White* (1) in the Court of Appeal reviews the authorities on the subject, and the judgment of Deasy, L. J., discusses them in detail. The case came before the Court of Appeal from a judgment of the Vice-Chancellor, and was heard before Palles, C.B., and Deasy and FitzGibbon, L.JJ. I need not go into the facts—they are not material to the present case. It was held by the Vice-Chancellor that the purchaser was entitled to compensation, and that decision was affirmed by the Court of Appeal. Palles, C.B. says:—"The plaintiff, a purchaser, has instituted this action to recover compensation for a mis-statement in the rental and particulars upon the faith of which he effected his purchase. The subject-matter of the sale was, *inter alia*, certain perpetual yearly rents issuing out of lands and hereditaments described in the rental, and 'all the timber, etc., excepted and reserved by the several fee-farm grants by which the said rents were respectively created.' One of those perpetual rents, which issued out of the lands of Ballykelly, was created by a fee-farm grant of 15th June, 1871, from the late Lord Annaly, through whom the vendor claims, and is described in lot 17. The rental, in reference to that lot, contains a statement that the fee-farm grant 'reserves all timber trees growing, or which thereafter grow, on said premises, to Lord Annaly, his heirs, and assigns.' In fact this grant did not reserve the timber." The mis-statement arose from an unfortunate mistake which is explained in the judgment. He says:—"I am satisfied that this mistake was committed through inadvertence, and without any intention of deceit; and I unreservedly and unfeignedly acquit the person who committed the mistake of moral culpability. Nevertheless, the result of that mistake was the circulation for the purposes of the sale, by those acting for the vendor, of a rental containing a statement that the grant excepted the timber, a statement not only contrary to the fact, but contrary

(1) 7 L. R. Ir. 160.

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to what the vendor's advisers knew to be the fact. It has been proved to my satisfaction that the purchaser was materially influenced by the statement in question in determining the amount of his purchase-money." That clearly applies to the present case. "The question," he says, "upon this appeal is, whether the execution of the conveyance and entry into possession, under such circumstances, debar the plaintiff of the right, otherwise unquestionable, of claiming compensation. Upon this question I am unable to entertain a doubt.

"First I take the case as depending upon representation. The representation, being contained in a rental, was made with intent to be acted upon by intending purchasers. It operated as a material inducement to the plaintiff not only to enter into the contract of purchase, but to accept a conveyance in pursuance of that contract. The subject-matter of the contract and of the conveyance is, in reference to timber, limited to the timber reserved by the grants. The timber in question, not having been so reserved, formed no part of the thing contracted to be sold, and was not in fact conveyed. It is elementary law that such a representation, so acted upon, is, in law, fraudulent," and he discusses the law on that basis. And he says, "It seems to me that such a claim is superior to, and not dependent upon, the agreement in question; that it is one which would have been equally capable of being enforced had the agreement not contained any such clause as the sixth; and that it entitles the plaintiff not to compensation under the agreement, but to compensation because of that agreement. The decree, however, has directed the compensation to be ascertained in Chambers, and therefore my difficulty does not arise.

"To this I have treated the case as depending solely upon representation. I have now to add that, in my opinion, the plaintiff's case does not rest on representation merely. Having regard to the mode in which timber, woods, rights of sporting, &c., are mentioned throughout the rental, I am of opinion that the statement as to the Ballykelly timber became a substantive part of the contract." And treating it either as an innocent misrepresentation or as an agreement the Chief Baron comes to the same conclusion that the purchaser had a right to compensation. Lord Justice Deasy (as I have said) discusses the authorities in detail

as to the effect of the conveyance, and he says:—"Here the representation in the rental that the timber was reserved to the lessor was made *bona fide*, but with abundant means of knowledge in the vendor's agent that it was in fact false. Grounding my decision on those cases, I think the purchaser is not precluded, by having executed the conveyance and gone into possession, from seeking compensation for the serious misdescription and mis-statement in the rental." And Fitz Gibbon, L.J., commences his judgment thus:—"I concur. I think we may test the applicability of the principles upon which the defendant relies by ascertaining whether he could have successfully defended an action at common law for deceit. Proof that the defendant wilfully made a representation, in fact false, with intent that the plaintiff should act upon it, and that the plaintiff so acted, with the direct consequence of appreciable loss to himself, would sustain the action for deceit, if the defendant *knew* his statement to be untrue. The knowledge necessary to maintain the action, however, is not actual consciousness of falsehood: knowledge of facts inconsistent with the statement will suffice; and the circumstance that, at the moment of making the false statement, the truth, which was within his knowledge, had escaped the attention or the recollection of the defendant would be immaterial. It is here clearly proved that all the facts were within the knowledge of the defendant's representative when making a statement inconsistent with them; and I think the form of the proceeding cannot alter the conditions establishing the responsibility for the deceit."

From that case it appears clear that the conveyance is not such a final and conclusive ending of all that concerns the contract as to bar a claim for compensation founded on misrepresentation. But it will be found in all the cases in which, after conveyance, compensation or something in its nature has been allowed, that this has been done on the ground of fraud (legal or equitable), or actionable misrepresentation, or of breach of a collateral contract. Now could such an action be maintained here? Lapse of time would, of course, be a bar of it; and even if it were the law that time runs not from the breach but from its discovery—and that is not the law—the breach, *i. e.* the liability to a tithe rentcharge exceeding the amount estimated at the time

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of the sale, was known ten years ago. The very same principles apply to the cases of such of the other defendants as have raised a similar case against the Irish Land Commission.

Apart from this I should notice, though I need not decide upon it, the argument for the Irish Land Commission founded on the 2nd section of the Irish Church Amendment Act of 1881 (44 & 45 Vict. c. 71, sect. 2). It appears to me that the liability of the Church Temporalities Commissioners (if any) in respect of misrepresentation or breach of warranty, or however else it may be formulated, was not transferred to the Irish Land Commission, because the subject of it, the land, was not transferred to them.

Mr. Jellett argues that the liability attached to the purchase-money, and that purchase-money was transferred to the Irish Land Commission. I more than question both propositions. Of the latter no proof is given. Of the former, I have already expressed my opinion that it is unsustainable.

R. W. L.

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*Appeal.* 1896. April 28, 29, 30. June 23.

The defendants, the Representative Church Body, appealed to the Court of Appeal (1).

*Meredith, Q.C.*, and *Jellett*, for the appellants:—

From the time when tithes were paid in kind, during the period while entering into a composition was only a voluntary step, afterwards when it became a matter of compulsion, and finally when composition was abolished, and tithe rentcharge established, the quantity of land occupied or owned was and is the unit of liability.

Prior to Goulburn's Act (4 Geo. 4, c. 99) the right to tithes was a right to the tenth part of the produce of land, the stock upon the land, and the personal industry of the occupiers (3 Cruise's Digest, p. 37).

Under Goulburn's Act, sect. 34, the composition authorized by the statute was to be applotted upon all land in the parish equally

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, BARRY, and WALKER, L.JJ.

in proportion, and according to the true annual value of the several lands; and the sums so assessed and applotted were to be paid from time to time by the occupiers of such land for the time being, or by the owners of such land occupying the same; and the assessment and applotment were to be made acre by acre. Further, by sect. 38 the amount of such composition and of the several portions thereof from time to time, not exceeding the amount of one whole year of such composition, became a charge on the lands specified in such assessment or applotment during the continuance of the composition, and was payable by the occupier or occupiers of such land, or by the owner of such land occupying the same for the time being, *according to the quantity of such land* which each such occupier should from time to time hold and occupy.

Under Stanley's Act certain classes of occupiers ceased to be liable to the payment of the composition; and the liability from which they were discharged was imposed upon their landlords: 2 & 3 Wm. 4, c. 119, ss. 12–16. But the composition was still assessed with regard to the quantity of land owned or occupied.

Then came the Tithe Rentcharge Act (1 & 2 Vict. c. 109), sect. 7 of which enacted that every parcel charged with tithe compositions or any applotment or assessment thereof should be charged with a rentcharge payable by the party having in such land the first estate of inheritance, or other estate or interest equivalent to a perpetual estate or interest as thereinafter defined, "*according to the quantity of such lands comprised in each such estate or interest.*" Thus the governing words which regulated the liability under Goulburn's Act are introduced into the Tithe Rentcharge Act in the very section which creates the rentcharge. It was plainly the intention of the Legislature to carry into the Tithe Rentcharge Act the provision of Goulburn's Act that the liability to pay was to be measured by the quantity of land. The language of section 7 shows that the person or persons to pay the rentcharge was or were the person or persons "from time to time" having in such lands the first estate of inheritance. If the responsible estate were divided amongst several owners, the tithe rentcharge was to be automatically apportioned according to the quantity of land held by each owner.

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To construe the Act as the plaintiffs seek to do would make the enactment work a revolution without express words showing any such intention, and would strike out of section 7 the words which in the former enactment expressed the very ground and criterion of liability.

The proviso in section 7 that one entire sum is to be charged on each estate though the compositions may have been separately applotted, merely provides that whenever the several parcels of land on which several applotments have been made, have been amalgamated so as to form one responsible estate, the rentcharge is to be recoverable as one rentcharge, so as to avoid multiplicity of suits. The tithe owner keeps his rentcharge entire, but it is payable only by the persons who have the first estate of inheritance according to the quantity of land held by them. The entirety of the tithe rentcharge and its chargeability are different things.

The section cited from the Irish Church Act is in our favour. Take section 6 as a whole. The three preceding subsections would have swept away the right of apportionment, and subsection 4 is introduced for the purpose of bringing matters back into line. It was not introduced for the purpose of making apportionable what before was unapportionable, but of maintaining the *status quo*.

Section 15 of the Land Law (Ireland) Act, 1887, was passed with a different object, viz. to enable the Land Commission once for all to redeem the apportioned part of the tithe rentcharge, and to hand over the lands free from all tithe rentcharge to the tenants. The Land Commission never apportion without redeeming tithe rentcharge. But the power of apportionment given by this section is to be exercised before conveyance to the tenants. The automatic apportionment for which we contend would not arise until after execution of the conveyance.

The observations of Lord Chancellor Law in *The Commissioners of Church Temporalities* v. *Grant* (1) do not touch the question of *how much* the owner is to pay: they deal only with the transfer of liability from the occupying tenant to the owner of the inheritance.

The power of distress given by section 29 of the Tithe Rentcharge Act shows that there was no need in Ireland for the intro-

(1) 11 L. R. Ir. 430; 10 App. Cas. 14.

duction of the powers of apportionment conferred by the English Act 6 & 7 Wm. 4, c. 71, s. 58. If the contention of the respondents is correct, there will be an inconvenience amounting almost to impossibility in the way of any purchaser of land who endeavours to ascertain his exact liability in respect of tithe rentcharge, because it will be necessary for him to ascertain whether the lands had been part of a larger estate at the time of the passing of the Act.

If the contention of the respondents is correct, there will have been a revolutionary change of vast importance in the nature of tithe composition introduced, without one sentence of express enactment or a single section indicating such an intention on the part of the Legislature by an Act of Parliament, whose preamble merely announces that "it is expedient to abolish compositions for tithes, *and in lieu thereof to substitute rentcharges* payable by persons having a perpetual estate or interest in the lands subject thereto, a reasonable allowance being made for the greater facility and security, and security of collection arising out of such transfer of liability from the occupiers to the owners of land."

THE COURT intimated that they desired the argument on the question of the liability of the Land Commission to indemnify the Representative Church Body to remain over.

*The Right Hon. C. H. Hemphill, Q.C.*, and *Cherry, Q.C.*, for the respondent Conolly:—

By the Tithe Rentcharge Act the tithe owner had to give up one quarter of his income, and was given in return the security of a responsible estate ascertained at the date of the Act, and charged with a rentcharge variable in amount, in accordance with the price of corn, but ranking in priority above all other charges on the land.

The words in section 7, "according to the quantity of the lands comprised in each such estate or interest," are used with respect to the date of the passing of the Act. The rentcharge was to be a charge on the estate of the owner of the inheritance measured according to the quantity of lands then comprised in his estate. Section 7 took the responsible estates as it found them,

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and charged them there and then with rentcharges which they have since continued to bear. It provided no machinery for apportionment of the rentcharge if the responsible estate was divided. There is no automatic apportionment of tithe rentcharge. There is no provision in the Irish statutes relating to tithes such as that contained in the English Act 6 & 7 Wm. 4, c. 71, s. 58, by which the tithe rentcharge may be specially apportioned. If there had been there would have been no reason for the introduction into the Irish Church Act, 1872, of section 6, sub-sect. 4, nor into the Land Law (Ireland) Act 1887, of section 15, by which power is given to apportion tithe rentcharges for the purposes of those Acts.

To read section 7 of the Tithe Rentcharge Act as the appellants do is to strike out of it the proviso that one entire sum is to be charged on each estate though the tithe composition may have been separately applotted on portions of it.

On the appellants' construction, a new rentcharge must start upon the sub-division of the responsible lands, quite irrespective even of the gale day. The preamble of the 13th section of the Tithe Rentcharge Act indicates that the intention of the Legislature was to settle once and for all time the amount of the tithe rentcharge. The language of Lord Selborne and Lord Chancellor Law in *Grant's Case* (1) shows that the rentcharge cannot be treated as apportioned in the way contended for.

We rely on *Christie* v. *Barker* (2).

June 23.

LORD ASHBOURNE, C.:—

This is an appeal from an order of the Master of the Rolls, which declared that a certain annual tithe rentcharge and the arrears thereof were well charged upon the glebe lands of the parish of Drumholm, in the county Donegal, containing 690 acres, comprising certain townlands, and upon all the estate and interest of the defendants in the said lands. The defendants are Gorman and others, including the Representative Church Body, and they are admittedly the owners of the lands charged with the tithe rentcharge.

(1) 10 App. Cas. 14, at p. 30; 11 L. R. Ir. 430. (2) 53 L. J. Q. B. 537.

The title of the plaintiff to recover the vicarial tithes payable out of the glebe lands in the parish of Drumholm is quite clear, and is not disputed.

On the 24th November, 1823, a statutable composition for all tithes within the parishes of Drumholm and Donegal was made. This composition was afterwards assessed and applotted on each parcel of the titheable lands within these parishes. The total amount so assessed and applotted on the glebe lands of the parish of Drumholm was £37 9*s.* 11*d.* (late Irish currency), one-third of which was payable by the vicar of the parish to the predecessors in title of the plaintiff.

The plaintiff claimed that by virtue of the Tithe Rentcharge Act, the said glebe lands (comprising the townlands of Drumchory Glebe, Murragh Upper Glebe, Drumbriston Glebe, Rathtinny Glebe, and Drummanus Glebe) became liable to and charged with the annual payment of one entire sum a rentcharge of £8 13*s.* 1*d.* (present currency), payable to him, being three-fourths of one-third of the amount of the tithe composition.

This annual tithe rentcharge of £8 13*s.* 1*d.* was paid to the trustees of the will of the plaintiff's father by the Commissioners of Church Temporalities up to 1st November, 1877, since which date no payment thereof had been made.

The several defendants all took defence to the action, but none of them have appealed except the Representative Church Body.

The appellants in 1878 purchased from the Commissioners of Church Temporalities in Ireland (now represented by the Irish Land Commission) the glebe residence, garden, and curtilage, with certain additional land of the benefice of Drumholm.

In the statement of defence the appellants (amongst other things) submitted—1, that upon the true construction of the statute 1 & 2 Vict. c. 109, they were only liable to pay a tithe rentcharge in respect of their estate and interest in the said lands according to the quantity of land comprised in the said estate and interest; 2, in the alternative they submitted that they were only liable, in conjunction with the residue of the lands comprised in the said townland of Drumbriston Glebe, in respect of the said lands and premises so vested in them as aforesaid, to a tithe rentcharge

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of £1 10*s.* 9*d.* and no more (being the amount payable to the plaintiff in respect of the applotment on the said townland), with a right of contribution and indemnity over against the owners of the responsible estate in the residue of the lands comprised in said townland; and 3, they submitted that the rentcharge claimed in the action was not one indivisible rentcharge, but was only portion of a rentcharge.

The case involves the consideration of the policy and construction of the Acts of Parliament dealing with tithe and tithe rentcharges in Ireland since 1820.

Goulburn's Act (4 Geo. 4, c. 99) provided composition in lieu of tithe, and enacted that the certificate should state "the amount of the true and just composition which shall henceforth be paid in satisfaction of all tithes in such parish, and in what proportions such compositions shall be paid or divided to or amongst the party or parties entitled to such tithes, or any particular share in proportion of such tithes." The Commissioners were also to assess and applot upon all land (not tithe free) within the parish, "according to the true annual value of such lands," the amount of composition and of the several portions thereof assessed and applotted, which were to be a charge on the land specified in such assessment or applotment during the continuance of such composition, not to exceed one year's amount. It is to be noted that the composition under Goulburn's Act was to be both voluntary and temporary.

Stanley's Act (2 & 3 Wm. 4, c. 119) made permanent the temporary provisions of Goulburn's Act and was compulsory in its operation.

The Tithe Rentcharge Act (1 & 2 Vict. c. 109) was enacted "to abolish compositions for tithes in future and to substitute rentcharges in lieu thereof." The first section provided that the rights of all persons in or to tithes or tithe compositions should at once "wholly cease and determine." It is not too much to say that the question in this case mainly depends upon the seventh section. Every word is of importance:—"And be it enacted, that every parcel of land charged with or in respect whereof the said tithe compositions or any applotment or assessment thereof would have been payable if this Act had not

been passed, shall be and become severally liable to and charged with the payment of an annual sum or rentcharge equal to three-fourths of the annual amount of such tithe compositions, and that such rentcharges shall, except as hereinafter excepted, be payable by the party having in such lands respectively the first estate of inheritance, or other estate or interest equivalent to a perpetual estate or interest as hereinafter defined, under which or derived wherefrom there shall be no such perpetual estate or interest, according to the quantity of such lands comprised in each such estate or interest: provided always that any landlord who shall have undertaken the payment of any composition for tithes under the provisions of the hereinbefore recited Act of the second and third years of the reign of his late Majesty shall, for and during the continuance of his estate and interest in the lands charged with the rentcharge payable in lieu of such composition, be liable to the payment of such rentcharge, provided he has an estate not less than an estate of inheritance in such lands, and that such rentcharges shall take effect from the first day of November last past, and the first payment of such rentcharges shall become due on the first day of November in this present year, and be then paid by one entire payment, and that the said rentcharges accruing due in each succeeding year shall be payable by two equal half-yearly payments, one whereof to become due on the first day of May and the other on the first day of November in each such year: provided always that although such tithe compositions may have been separately applotted or assessed upon different portions of such lands, the lands comprised in each such estate or interest shall be charged with the annual payment as aforesaid of one entire sum or rentcharge, equal to three-fourths of the gross annual amount of such several applotments or assessments: provided also that the amount of such rentcharges shall be computed on the gross amount of such tithe compositions as stated in the certificates and applotment-books thereof respectively, without regard to the deduction of fifteen pounds per centum, claimable by persons undertaking the payment of such tithe compositions under the provisions of the above-recited Act of the second and third years of his late Majesty's reign: provided always that all certificates and applotment-books of such compositions shall be deemed and

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taken as valid and effectual for the purpose of ascertaining the rentcharges to be paid in lieu thereof, save so far as the same may be varied in pursuance of the provisions in this Act, in which case the rentcharge shall be ascertained by such amended certificate or applotment-book."

Before discussing the construction of this important section it will be convenient to read "the calculation (which was handed in) showing the tithes payable out of the several townlands in Drumholm Glebe":—

| Townlands. | Amounts applotted, Irish currency. | Amounts applotted, English currency. | Tithe rent-charges payable under Act 1 & 2 Vict. c. 109 (Tithes reduced by one-fourth). | One-third of tithe rent-charges payable to lay impropriator. |
|---|---|---|---|---|
| | £ s. d. | £ s. d. | £ s. d. | £ s. d. |
| Drummanus, . | 5 12 8 | 5 4 0 | 3 18 0 | 1 6 0 |
| Drumchory, . | 6 15 2 | 6 4 9 | 4 13 7 | 1 11 2 |
| Drumbriston, . | 6 13 3 | 6 3 0 | 4 12 3 | 1 10 9 |
| Murvagh Upper, | 13 14 4 | 12 13 3 | 9 9 11 | 3 3 4 |
| Rathlinny, . | 4 14 6 | 4 7 3 | 3 5 6 | 1 1 10 |
| | 37 9 11 | 34 12 3 | 25 19 3 | 8 13 1 |

The plaintiff claims that he is entitled to one "entire" rentcharge of £8 13*s.* 1*d.* out of the whole and every part of the said townlands; while, as I have already said, the appellants contend that they are only liable to pay a tithe rentcharge in respect of their estate and interest in the said lands and premises according to the quantity of land comprised in their said estate and interest. They submit in the alternative that if held liable for more it would never exceed £1 10*s.* 9*d.*, and then they would have a right of contribution and indemnity over against the other owners of the responsible estate in the residue of the lands comprised in the said townland.

In my opinion the plaintiff's contention is well founded; and as between the owner of the tithe rentcharge and the lands on

which it is charged, it is and remains one entire and indivisible rentcharge. The words of the proviso, so often quoted, point powerfully to this being the true meaning:—"Provided always that, although such tithe compositions may have been separately applotted or assessed upon different portions of such lands, the lands comprised in each such estate shall be charged with the annual payment of one entire sum or rentcharge equal to three-fourths of the gross annual amount of such several applotments or assessments." To hold that each time there was a sale of the lands comprised in the estate charged there was to be a new series of even smaller rentcharges created would make the position of the owner of the tithe rentcharge intolerable. If the rentcharge had been created by deed it would not be liable to be thus divided and frittered away, and no reason or policy can be suggested why tithe rentcharges created by this statute should be in a worse position. It is not, in my opinion, the construction of the seventh section, and in the sixty years during which it has been part of the statute law no case has ever been so decided. On the contrary, Lord Chancellor Law, in the well-known case of *The Commissioners of Irish Church Temporalities* v. *Grant* (1) laid down the construction of the section with unhesitating clearness:—"Speaking generally, the practical effect of this clause was, I apprehend, to give to the tithe composition owner one single rentcharge, charged upon and payable out of the entire of a landlord's estate, in lieu of a number of compositions, each of which had been charged upon and payable out of only a small part of the land composing that estate. Thus, taking the case of a fee-simple estate of one thousand acres occupied by fifty tenants: each of the fifty separate parcels of land so held was, up to the passing of the Act of 1838, charged for ever with a distinct and separate annual payment by way of composition for tithe. But, by the Act of 1838, all these fifty small annual sums (or rentcharges), each charged upon its own small piece of land, were 'abolished': and in the place of them one substantial rentcharge was created, charged upon the entire one thousand acres constituting the estate. This was, it must be admitted, a very

(1) 11 L. R. Ir. 453.

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important change and renders it, I think, extremely difficult to regard the new rentcharges thus created as even substantially identical with the groups of abolished composition rentcharges which they replaced. The plaintiffs' counsel have insisted, and rightly, as I think, that those compositions were, while they were suffered to exist, as truly and strictly rentcharges as the new rentcharges which succeeded them. They were, as we have seen, charged on the fee of each parcel of land out of or in respect of which they were payable, and were recoverable by distress as well as action. The personal liability to pay had been transferred by Lord Stanley's Act from the occupiers, if only tenants at will or from year to year, to the holder of the next superior estate for the time being, without in other respects affecting the rents or compositions themselves as charges upon the land. And if the only object of the Legislature in passing the Act of 1838 had been to make a further change in this personal liability to pay, and to reduce the amount in each case by one-fourth, this might easily have been done by a simple enactment to that effect, leaving the old charges which had been expressly created as, and were therefore in fact, compositions, in other respects unaffected, and therefore still subsisting. This course, however, was not taken. The rentcharges which had been expressly created as, and were in fact, 'compositions,' were distinctly and absolutely 'abolished', and instead of them new rentcharges were created, payable to the same persons, and measured, no doubt, by reference to the amounts of the abolished compositions, but having no further connexion with or relation to them; and, as a general rule, each new rentcharge equal in amount to three-fourths of a whole group of the old compositions, and charged upon an entire estate, instead of each composition being charged on each separate holding composing it." This opinion of Lord Chancellor Law may not have been strictly necessary for his judgment, but it possesses all the authority of that most able judge, and no dissent was expressed from it by Lord Justice Fitz Gibbon or by Lord Selborne.

It is worthy of note that by sect. 15 of the Land Law (Ir.) Act, 1887, express power is given to the Land Commission on a sale, if they think it expedient to apportion tithe rentcharge, as well as crown rent and quit rent, between the land sold and the other land.

Mr. Cherry forcibly pointed out that this power would not be needed if the appellants' contention was right. The same argument arises on the sections in the Irish Church Amendment Act, 1872. Mr. Jellett tried most ingeniously to argue that there was a distinction between the entirety of the tithe rentcharge and its chargeability. They are not of course the same thing, but the argument for the entirety rests on too strong a basis to be shaken.

I was impressed by the able arguments of the appellants' counsel, but I have arrived at the clear conclusion that in this, the main question in the case, the contention of the plaintiff, that he is entitled to one entire rentcharge out of the lands, and that he cannot be forced to split it up, and divide it as may suit the wishes and conveniences of the owners of the lands on which it is charged, is correct, and supported alike by reason and authority.

In my opinion, the judgment appealed from, so far as it affects the plaintiff, Mr. Conolly, should be affirmed and the appeal dismissed with costs.

FITZ GIBBON, L. J.:—

I concur. The foundation of our decision is the fact, which has perhaps been admitted or assumed, rather than distinctly proved, that when the Tithe Rentcharge Act came into force all the parcels of glebe land, previously charged with separate compositions, amounting in all to £8 13*s.* 1*d.* per annum, were held by the clergyman of the parish of Drumholm for the first estate of inheritance, which then became liable to the new rentcharge.

It is also proved, or admitted, that from the passing of the Tithe Rentcharge Act until the Irish Church Act, 1869, came into operation, the annual sum of £8 13*s.* 1*d.* was always paid by or charged against the clergyman in one sum, as and for the tithe rentcharge payable to the lay impropriator out of the same glebe lands.

Starting from these facts, I cannot escape the conclusion that one entire rentcharge became charged upon all the glebe lands under the Tithe Rentcharge Act—one entire rentcharge consisting of the

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aggregate of the several distinct sums which had previously been applotted as compositions for tithes upon the several separate parcels of land occupied by the clergyman or his tenants. This rentcharge, being one and entire, must issue out of each and every part of the lands included in the single estate which constituted the property charged. *Grant's Case* (1) decides that the statutory rentcharges are the same in nature as rentcharges created by deed. The analogy of an incumbrance charged by deed upon a perpetual estate points to the conclusion that a tithe rentcharge cannot be apportioned without the concurrence of the owner. Once an owner in fee has created an incumbrance, no dealing with his property can apportion, release, or alter the charge, as against the owner of the incumbrance, without his concurrence.

The argument from inconvenience cuts both ways. If the rentcharge is divisible when the lands charged are divided, it must also be cumulative when estates are amalgamated. The inconvenience to the owner of the incumbrance would become an impossibility. The owner of such a rentcharge could have no means of tracing the transmutations of the property charged, and could never know where or how to recover the amount due to him, if his rights could be affected by the acts of successive landowners in selling or purchasing parcels of land.

The express language of the Tithe Rentcharge Act, the corresponding English legislation, the statutory provisions for redemption, apportionment, and indemnity in the Landed Estates Acts, and Land Acts, and the practice of conveyancers, all point to the same conclusion: viz. that a tithe rentcharge which has once attached to several pieces of land, cannot subsequently be affected by automatic apportionment. It remains an incumbrance upon all the lands, and the title must be traced subject to it, as to any other incumbrance upon the fee; it may be dealt with, in the way of indemnifying different parcels of land, *inter se*, or the like, or it may be redeemed or apportioned in the manner provided by statute, but not otherwise. The plaintiff is therefore entitled to recover the whole amount out of each or any part of the lands charged, but the Land Commission may have to make good to the

(1) 11 L. R. Ir. 430, 438.

Representative Church Body, any contract, or representation, upon which the lands now held by the latter were conveyed by the Church Temporalities Commission. *Appeal.* 1896. CONOLLY *v.* GORMAN.

BARRY and WALKER, L.JJ., concurred.

PER CURIAM:—

Dismiss the appeal with costs to the plaintiff: liberty to the defendants the Representative Church Body to re-enter the case on the question of relief over against the Irish Land Commission: reserve the question of costs as between the Representative Church Body and the Irish Land Commission.

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Pursuant to the leave so reserved the Representative Church Body re-entered the appeal for argument on the question of their right to be indemnified by the Irish Land Commission against payment of any tithe rentcharge in excess of six shillings. 1897. Jan. 21, 22, 25.

*Meredith, Q.C.*, and *Jellett*, for the appellants.

*Matheson, Q.C.*, and *D. M'C. Mahony*, for the respondents.

The arguments sufficiently appear from the judgment.

*Cur. adv. vult.*

FITZ GIBBON, L. J., delivered the judgment of the Court as follows:— March 1.

This action was originally brought by Thomas Conolly, as lay impropriator of the tithes of the parish of Drumbriston, against the Representative Church Body and ten other defendants, holding titheable lands in the parish, to recover a tithe rentcharge of £8 13*s.* 1*d.*, with sixteen years' arrears, claimed to be charged as one indivisible rentcharge upon detached lots of glebe-land, containing in all 690 acres, situated in five different townlands of the parish, and now held separately by a large number of persons

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who bought these lands from the Church Temporalities Commissioners since the Church Act, 1869.

It appeared that the titheable estate in all these glebe lands belonged to the incumbent of the parish at the passing of the Act 1 & 2 Vict. c. 109; and, although separate applotments of tithe-composition had been originally made upon the glebe lands in the several townlands, the Master of the Rolls held, and this Court affirmed the decision, that under the Act 1 & 2 Vict. c. 109, these were united into one rentcharge of £8 13*s.* 1*d.*, with which all these church lands became charged in the lands of the incumbent, and, consequently, in the hands of the Church Temporalities Commissioners under the Church Act, 1869. Accordingly the defendants were decreed to pay this rentcharge of £8 13*s.* 1*d.* with six years' arrears, as issuing out of all and every part of the lands charged. Of course, any owner compelled to pay more than his proper share can claim contribution from the other owners, unless his right of contribution has been disturbed by the dealings of the Church Temporalities Commissioners, or of the owners *inter se*. The division and sales which have taken place render the collection or recovery of contribution troublesome, and, perhaps, even to some extent practically impossible. In substance, the case is now narrowed to a contention between the Representative Church Body and Irish Land Commission, as to which of those bodies is to undertake the task of collecting the contributions, to make up the rentcharge of £8 13*s.* 1*d.*, in the event of the Representative Church Body being, in the first instance, compelled to pay the whole of it to the impropriator.

The Representative Church Body defended the action up to the hearing, and on appeal, first upon the ground that in 1878 they purchased the ecclesiastical residence with the garden and curtilage, and about 22 acres of additional land, under the Church Act, from the Church Temporalities Commissioners, as being subject to an annual tithe rentcharge of six shillings only, and that, upon the true construction of the Act 1 & 2 Vict. c. 109, the Representative Church Body was only liable to pay a rentcharge proportionate to the quantity of land so purchased, which may be taken as not more than 6*s.* per annum, or, in the alternative, that the lands so purchased were only liable in conjunction with the

residue of the lands in the same townland (called Drumbriston) to a tithe rentcharge of £1 10*s.* 9*d.*, being the amount originally applotted on that townland, and that, in either event, the Representative Church Body was entitled to contribution and indemnity from all the other defendants in respect of any sum in excess of the proper proportion.

All this part of the case has been disposed of by the judgment of the Master of the Rolls, affirmed by this Court, holding the plaintiff entitled to one rentcharge of £8 13*s.* 1*d.*, issuing out of each and every part of the 690 acres of glebe lands in all the five townlands, and all the defendants have been decreed to pay to the plaintiff £51 18*s.* 6*d.* for six years' arrears of that rentcharge, with the costs of the action. Some of the defendants had lodged money in Court sufficient to discharge the shares ultimately payable by them, and they have got credit for the sums so lodged, but the Representative Church Body, as well as the other defendants, though entitled to contribution if compelled to pay, is declared liable to the whole rentcharge in respect of the lands purchased from the Church Temporalities Commissioners, and this liability is the present subject of contention.

The Representative Church Body, on December 8, 1894, by leave of the Court, served a third party notice on the Irish Land Commission, as representing and being the successors of the Commissioners of Church Temporalities, claiming to be indemnified by them against payment of any tithe rentcharge in excess of six shillings per annum, that being the amount subject to which their lands were vested in them by the Commissioners; and they submitted that in case they were held liable to pay more than six shillings per annum, they were entitled to be indemnified by the Irish Land Commission to the extent of such excess.

The Master of the Rolls dismissed this claim against the Irish Land Commission with costs, on the ground that it was barred by the Statute of Limitations; but he reserved liberty to the several defendants to re-enter the action at any time, in order to ascertain and declare their respective rights of contribution and indemnity as between themselves.

When the appeal was first heard in this Court, it was thought convenient to reserve the question between the Representative

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Church Body and the Irish Land Commission until the rights of the plaintiff had been first determined; but our order of June 23, 1896, which dismissed the appeal with costs to the plaintiff, gave liberty to the Representative Church Body to re-enter it on the question of relief over against the Irish Land Commission, and reserved the question of costs between the Irish Land Commission and the Representative Church Body. We have now to decide this part of the case, which was fully argued during the last sittings.

Mr. Matheson, for the Irish Land Commission, put forward the following contentions on their behalf, which I shall consider in the order in which he presented them:—

1st. That the Irish Land Commission is not liable for the acts or defaults of the Church Temporalities Commission.

2nd. That if the Church Temporalities Commission was in default, the Irish Land Commission has no funds to meet a demand based upon such a default.

3rd. That, if the Representative Church Body had any cause of action against the Church Temporalities Commissioners, it was only a claim for damages for false representation; in other words, an action for deceit, which, having arisen in 1878, is now barred by the Statute of Limitations; and—

Lastly, that the Representative Church Body has sustained no damage, because, if the real state of facts as to the tithe rent-charge had been disclosed by the Church Temporalities Commissioners upon the sale in 1878, the result, as regards the value of the lands purchased, would have been the same, inasmuch as other lands are liable to contribute, and the ultimate liability of the Representative Church Body, measured in proportion to their lands, does not exceed six shillings per acre.

The first two of these contentions depend on the relative constitution, duties, and liabilities of the Church Temporalities Commission and the Irish Land Commission, under the statutes regulating the administration of the property of the late Established Church of Ireland, and substituting one of these bodies for the other. Omitting provisions which are immaterial for our present purpose, the Irish Church Act, 1869, section 12, vested in the Church Temporalities Commissioners as a corporation, the eccle-

siastical property of the Church of Ireland, including all the glebe lands of Drumholm parish, subject to any charges affecting the same, including the tithe rentcharge of £8 13*s.* 1*d.* Section 22 enabled Her Majesty to incorporate the Representative Church Body with power to hold lands. Section 27 directed the Church Temporalities Commissioners, on the application of the Representative Church Body, by order to vest in that body the ecclesiastical residence, garden, and curtilage of Drumholm upon payment of a prescribed price; and section 28 empowered the same Commissioners, on like application, to vest additional land in the same Body, *at a price to be agreed upon.* Section 34 directed the Commissioners to convert the Church property into money, subject to the other provisions of the Act. Section 35 describes the vesting orders of the Commissioners as operating as conveyances. Section 36 directed that all moneys whatsoever payable to the Commissioners should be paid into such bank, and be invested in such manner, as might from time to time be determined by the Treasury. Section 59 enabled the Commissioners to raise money for the purpose of carrying into effect any of the provisions of the Act, and to give as security the whole or any part of the property vested in them by the Act; and, lastly, section 68 enacted that the proceeds of the Church property should be applied as Parliament should thereafter direct.

In effect, the Act made the Church Temporalities Commissioners trustees for winding-up the temporal affairs of the disestablished Church, with power to raise money upon the security of its property, and with a duty to hold at the disposal of Parliament any surplus remaining, after the discharge of all just and lawful obligations, and after defraying the expense of administration and of realisation. It appears clear that, in the hands of the Church Temporalities Commissioners, as trustees for sale, the Church property and its proceeds remained liable to any legal or equitable demands incurred, by contract or otherwise, through the action of the Commissioners in carrying out the sale.

No direction of Parliament, under section 68, has been referred to which could take priority of liabilities incurred by the Commissioners to purchasers of Church property. Though Parliament has, on several occasions, dealt with the *surplus*, and

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though advances have been raised upon the security of the Church property, it has not been shown that the whole property has been exhausted, and it has not been shown that, if the Church Temporalities Commissioners were still in existence, they would not now have funds in their hands available to meet any legal or equitable judgment against them, even if such a defence would avail, which, on general principles, it could not.

We are thus brought to the question, whether the Irish Land Commission now stands in the place of the Church Temporalities Commissioners, as regards liabilities to purchasers of Church property which would affect the Church Temporalities Commissioners, if still existing. This question turns upon the Irish Church Act Amendment Act, 1881, which substituted the Irish Land Commission for the Church Temporalities Commissioners. Its title is material. It is an Act to make provision for the *future administration of the property and the performance of the duties* vested in the Church Temporalities Commissioners. Section 2 enabled the Lord Lieutenant, by order in Council, to dissolve the corporation of the Church Temporalities Commissioners; but it enacted that "such order shall not be made unless a corporate body, under the title of the Irish Land Commission, to whom the property vested in the Church Temporalities Commissioners may be transferred under this Act, has previously been constituted by statute."

On the dissolution of the Commissioners, certain provisions "shall take effect with relation to the property belonging to them . . . and with respect to their powers under the Irish Church Act, 1869," including the following :—

1. Every estate and interest in land is, without conveyance, vested in the Irish Land Commission, for the same uses, trusts, and purposes as before the Act. "The said Irish Land Commission shall be *entitled to the benefit of all* covenants, conditions, or *agreements*, in relation to the premises so transferred, express or implied, and to maintain all actions and proceedings grounded thereon, in their own name, and the said Commissioners shall in like manner be *liable to all* payments, reservations, covenants, conditions, and *agreements, express or implied*, in respect of the same premises respectively, as fully as the Church Temporalities

Commissioners would have been if this Act had not been passed."

It would be a strange anomaly if the Act which thus transferred all the property, and all rights and liabilities based on agreements, express or implied, in respect of that property, did not equally transfer rights and liabilities, at law or in equity, in respect of the dealings by which the Church Temporalities Commissioners had converted property into money in exercise of their statutory powers.

2. All moneys, stocks, and securities standing in the name of the Church Temporalities Commissioners in the Bank of Ireland (presumably the Bank into which "all moneys whatsoever payable to the Commissioners" had gone) were transferred under the Act of 1869, sect. 36, to the name of the Irish Land Commission, subject to the same trusts and powers as before the dissolution.

3. All documents were transferred to the Irish Land Commission, who were to retain such as were necessary for the management of the property transferred to them, and to preserve and permit reasonable access to all the transferred documents, until they should lodge them, as their retention ceased to be necessary, in the Public Record Office.

4. Every *obligation* and *chose in action* might be proceeded upon by the Irish Land Commission in their own name.

Lastly, "All the powers, authorities, and *duties*, rights, titles, and interests, vested in or exercised by the Church Temporalities Commissioners under the Irish Church Act, 1869, or any Act amending the same, and in force at the time of the dissolution, shall vest in, and *devolve upon*, and be exercised by, the Irish Land Commission, who shall for the purposes of such *Acts be deemed to be the successors of the Commissioners of Church Temporalities in Ireland.*" This general and concluding enactment proves the scope and effect of this Act to be for all the purposes of the Church Acts, a complete substitution of the one corporation for the other. *Le Roi est mort; Vive le Roi!* At the passing of this Act the glebe lands, such as those of Drumholm Parish, either had been sold or they remained unsold. If unsold, they passed to the Irish Land Commission as land. If sold, the proceeds had gone into the Bank of Ireland, and all the money then remaining passed to

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the Irish Land Commission, subject to all liabilities. In every sense, and in express words, the new corporation became the successors of the dissolved one. It is impossible to exclude from the liabilities imposed upon the Irish Land Commission the liability to meet any judgment of a competent Court of law or equity, which was based upon the dealings of the Church Temporalities Commission with the property vested in them by the Church Acts, and which, but for their dissolution, would have been enforceable against those Commissioners.

Any other construction of the Act of 1881 would lead to the result, repugnant to all justice, that a subject who had a lawful claim, and a legal remedy, against the Church Temporalities Commissioners at the moment of their dissolution, lost his claim and his remedy by the statutory substitution of the Irish Land Commission for the previous statutory corporation which was answerable to him. We cannot hold that the substituted corporation which succeeded to all the property did not, at the same time, succeed to all the legal and equitable liabilities arising from the dealings of their predecessors with the Church property. Mr. Mahony tried to support this position by two cases relating to sanitary authorities: *Glossop's Case* (1) and *Attorney-General* v. *Birmingham Drainage Board* (2). The first decided that the defendants, a new Drainage Board, who had themselves done no actionable act, were not liable for a nuisance alleged to have been caused before their creation by the acts of others, in improperly using a sewer transferred to the defendants. But the Court expressly said that if the previous parties "had been using the sewer unlawfully, the plaintiff had his remedy against them, and was in no way deprived by the Act of Parliament, or anything the defendants had done or permitted to be done, of any such right." It was even held that the defendants had no duty, and possibly even had no power, to alter the existing user of the sewer, so as to remedy the complaint; but the ground of decision distinctly was that the defendants had not failed to perform any duty that fell upon them, and that they had done nothing themselves to injure the plaintiff, and that he had his remedy, if any, against the predecessors.

(1) 12 Ch. D. 102. (2) 17 Ch. D. 685.

In the *Birmingham Case* (1), Sir George Jessel based his decision upon the fact that the obligations transferred to the defendants were limited to those attaching under a particular Act, and as to the obligation in question, he says it "is not attaching under this Act, or mentioned in this Act, nor has it anything to do with the Act." Here, on the contrary, the liability, if any, attached under the Church Act, and has nothing to do with anything else. Thus the Irish Land Commission, as the successors of the Church Temporalities Commissioners, are obliged to meet the question whether the dealings of those Commissioners with the Representative Church Body gave that body a cause of action against the Commissioners, and if so, whether it has been since barred by the Statute of Limitations, with the final question whether the Representative Church Body has sustained any actionable injury. I therefore, proceed to examine those dealings, treating the case as if the Church Temporalities Commissioners were still undissolved, and were now the defendants in a suit for indemnity.

Our decision must depend on the effect of the transaction which was carried out by the vesting orders of 8th August, 1878. It appears in evidence that the Commissioners regularly paid the tithe rentcharge of £8 13*s.* 1*d.*, as a single rentcharge issuing out of all the glebe lands of Drumholm, up to and for the half year ending November 1st, 1877. They therefore had full knowledge of the existence and particulars of the rentcharge, fresh in their minds, and recorded in their books, in 1878. The terms of purchase, showing how the amount was ascertained which was paid by the Representative Church Body, for the residence, garden, curtilage, and additional land, are also in evidence. Those terms are headed "Irish Church Temporalities Commissioners, sale of ecclesiastical residences, and lands, under sections 27 and 28 Irish Church Act, 1869." The gross total purchase-money was £652 18*s.* 9*d.*, from which was deducted "21 times the amount of tithe rentcharge 6/0 × 21 = £6 6*s.*," leaving the net price £646 12*s.* 9*d.* Of this sum £257 was paid for the residence, garden, and curtilage, and the balance, £389 12*s.* 9*d.*, was paid for the additional land. The vesting order as to the residence is silent as

(1) 17 Ch. D. 685.

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to incumbrances; the vesting order as to the additional land is expressly "subject, in conjunction with the remainder of the said lands, to *an annual tithe rentcharge of six shillings per annum.*" What is the effect of this as a contract by the Representative Church Body? Plainly a contract to pay, and to indemnify their vendors against, the annual tithe rentcharge of six shillings per annum, the full price of which was deducted from the purchase-money. Regarded from the purchaser's side, it is impossible to treat the transaction as resting merely in representation; it clearly carried with it, against the purchaser, a contractual obligation to discharge an annual rentcharge of six shillings per annum. When the Irish Land Commission asks us to treat the case, on the vendor's side, as one of false representation, deceit, or even mistake, on the part of their predecessors, they ask us to go against the evidence as to the actual fact. When a question was asked in 1885, the Secretary of the Commissioners, by letter dated July 15th, 1885, stated that they sold the land "subject to 6*s.* *as a probable liability in respect of the rentcharge*, having regard to the quantity of land stated." No doubt he then said that the rentcharge really payable out of the lands was that applotted upon Drumbriston only, amounting to £1 10*s.* 9*d.*, forgetting that £8 13*s.* 1*d.* had been paid up to 1877. But knowing the facts as they did, they must have intended to treat the six shillings per annum as the whole sum to be paid by the purchasers, though a larger rentcharge was payable by the vendors to the impropriator. Some, if not all, of the other glebe lands of the parish were then still in their hands, and their actual intention then must have been to apportion 6*s.* as a rentcharge to be paid by the purchaser, leaving the remainder to be still paid by themselves out of the remaining lands. The only possible mode by which this intention could be carried out would be by a contract on the purchaser's part to pay the 6*s.*, and a correlative contract or obligation of the vendors to pay the rest. As the Representative Church Body was credited with the value of the rentcharge of 6*s.*, mentioned in the terms of purchase and in the order, that Body was clearly bound by the contract of sale to indemnify the vendors against it. So the vendors who received the price of the land as subject to 6*s.*, and no more, were, in their turn, bound to indemnify the purchasers against

any excess. It is plain that it was within the power of the Commissioners, at the time, to give effect to the transaction according to its terms. They alone knew of the liability, and they fixed and received the price, in cash, of the land exonerated from anything more than 6*s*. If necessary, we might hold that there was a mutual contract for indemnity as to the 6*s*., and as to the excess. It is hard to believe that there was any false representation, or any mistake. The fact that other parts of the lands were sold to other parties on terms dealing with further amounts of the tithe rentcharge, would have made it almost certain that a division of the liability was really intended, and this is made doubly certain to be the true explanation by the Secretary's letter of the 25th March, 1875, showing that the Commissioners contemplated buying up the rentcharge, for the purpose of selling the land.

But it is not necessary to treat the case as one of agreement, express or implied. A specific contract of sale, subject to a defined incumbrance, creates an equity against the vendor to indemnify a purchaser for value against any other or greater incumbrance than that subject to which he has bought from the vendor, and which is specified in the conveyance. This equity is analogous to the remedy upon an express or implied covenant for title or for quiet enjoyment. The language of Lord Eldon in *Waring* v. *Ward* (1), substituting vendor for purchaser, fits the case. The party means at the time of the covenant to sell the estate, subject to the specified charge, and to no more. If he enters into no obligation with the party to whom he sells—neither bond nor covenant of indemnity—to save him harmless from any further charge, yet this Court, if he has the purchase-money, will, independent of covenant, raise upon his conscience an obligation to indemnify the vendee against the obligation to pay the additional money; for, having received the purchase-money, he must be supposed to intend to indemnify the vendee against any greater charge than that described in the conveyance. Though Lord Eldon was dealing with the purchaser, there can be no difference between the nature or effect of the obligations upon conscience at the two sides of the transaction.

(1) 7 Ves. 336.

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The Statute of Limitations does not apply in such cases until there is a breach, and an equity to indemnity is outside the statute. A mere accident led to the question not being raised until now. In the same year in which the vesting orders were made the rent-charge passed to a minor, and it was allowed to remain unpaid and undemanded for sixteen years. This, no doubt, also interrupted the intended purchase of it. Is it possible to doubt that, if it had been demanded from the Church Temporalities Commissioners in 1878, they would have paid all but the 6*s.* and would have got 6*s.*, and no more, from the Representative Church Body? If at that time the Representative Church Body had been required to pay more than 6*s.*, that Body would in turn have been entitled to repayment of the excess from the Commissioners. If the legal rights stood so in 1878, and could then have been based on contract or on equity, they cannot have changed since, and the Irish Land Commission cannot now resist the claim of the Representative Church Body, unless an action for false and fraudulent representation, barrable by Statute, was the only remedy available against the Church Temporalities Commissioners in 1878.

When it is said that the Representative Church Body can still look to the other lands, it is forgotten that these lands have passed to the present owners through and under the Commissioners. If the obligation of the Commissioners rests on contract or on equity, the other purchasers also may have remedies against them, and circuity of action might be the only result of sending the Representative Church Body elsewhere for repayment. But, in any view, if there is an obligation of indemnity which could be asserted against the Commissioners, their successors must discharge it, and it rests on them, and not on those who derive under them, to answer that obligation.

When it is said that there has been no loss, it is forgotten that the cause of action is not confined to repayment of money actually paid. Liability to pay, and immediate risk of being compelled to pay, is enough to entitle the Representative Church Body to demand indemnity, and a judgment to pay has been pronounced. The mode in which the Commissioners have dealt with other purchasers, and with other parts of the lands, has made it difficult, if not impossible, for the Representative Church Body to recover

full contribution, piecemeal, from the other titheable lands, or from the large number of proprietors amongst whom the lands have been divided, and between whom and the Representative Church Body there is no privity.

The Commissioners, who were contractually or equitably bound to indemnify the Representative Church Body, must discharge that obligation, and, when a breach has taken place, they cannot drive the Representative Church Body to seek their remedy in other and less accessible quarters. It is idle to say that the value of the land is the same, when it is liable to £8 13*s.* 1*d.*, recoverable, if at all, to the extent of £8 7*s.* 1d., in small, unascertained sums, by uncertain, difficult, and costly proceedings, against a large number of persons, as it would be if only 6*s.* were chargeable, or even if £8 7*s.* 1d. were recoverable, by way of contribution or indemnity, in one sum, from the Irish Land Commission.

It is not clear whether the Representative Church Body has yet paid anything more than 6*s.*; and, while we declare the respective liabilities of the Commissioners and of the Representative Church Body, we reserve liberty to either party to apply, as may be necessary, to enforce those liabilities. But no such application ought to be necessary. The Land Commission must arrange to indemnify or recoup the Representative Church Body as to the excess above 6*s.*, and may, at the same time, arrange for the collection of the proper contributions from the other parties liable.

From 1895 to the present time, in the pleadings, and especially in the letter addressed by the solicitor of the Representative Church Body to the Irish Land Commission, on July 15th, 1896, the case of the Representative Church Body has been clearly and well put forward. The Irish Land Commission must pay the costs incurred by the Representative Church Body subsequent to the first hearing of this appeal.

But the other costs of this action, which were made payable to the plaintiff by the defendants because they resisted his demand, cannot be thrown upon the Irish Land Commission.

I have stated in general terms the grounds and principles of our decision; it is not necessary to refer to the authorities which were cited further than to say that such cases as *Barbour* v. *Hous-*

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*ton* (1) and *Gillis* v. *Gild* (2) apply only to the common law action of false representation and deceit.

In *Ingram* v. *Thorp* (3), dealing with a clear case of misrepresentation at common law, Shadwell, V.C., says:—"The plaintiff must be entitled to say to the owner of the property who made the representation—If I pay £1500 upon a representation falsely made by you that the estate you gave as a security is worth £2500 more than it was in truth worth, you shall make good your representation out of the property so far as it will extend; and if it shall be insufficient, then out of the other assets. *This appears to me to be a clear head of equity.*"

In *Averall* v. *Wade* (4) the Lord Chancellor put the indemnity which he enforced on higher grounds than covenant, on "the peculiar jurisdiction of Chancery, by specifically doing that which ought to be done." "The equity" (he says) "binds the land."

In *Slim* v. *Croucher* (5) Lord Campbell, C., begins his judgment with the following passage, which may well be applied to the present case:—

"The defence set up in this suit is that there was a remedy at law, and that that is the only remedy competent to the plaintiff. Now, that there was a remedy at law I think is quite clear. Here was a misrepresentation made by the defendant of a fact which ought to have been within his knowledge. It was made with the intention of being acted upon," it was acted upon, "and thereby a loss accrued to the plaintiff, and there is no doubt in my mind that an action would lie, and that it would be for a jury to assess the damages. I am of opinion, however, that this belongs to a class of cases over which Courts of Law and of Equity have a common jurisdiction. . . . It is a much fitter case for a Court of Equity, because a Court of Law could only have left it to a jury to assess the damages; whereas here by the superior powers of the Court of Equity justice can be done between the parties in the most minute detail." In concurring, Knight-Bruce, L.J., says:—"A country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilization," and he holds that "the jurisdiction

(1) 14 L. R. Ir. 273.
(2) 9 Q. B. D. 68.
(3) 7 Hare, at p. 74.
(4) Ll. & G. temp. Sugden, at pp. 260 and 264.
(5) 1 De G. F. & G. 518.

not only belongs to the Court of Equity but belonged to it originally."

If, as we hold, the remedy is in the nature of a right to indemnity or guarantee, whether arising by contract express or implied, or through an equity to indemnify the purchaser, or to make good the representation that the land was subject to six shillings a-year, and no more, in any or all of these cases the Statute of Limitations did not apply, and did not begin to run, until the arrears of the rentcharge of £8 13*s.* 1*d.* were claimed by the plaintiff in this action, which was commenced on July 21, 1894.

Solicitor for the plaintiff: *H. G. Cooper.*

Solicitors for the Representative Church Body: *Maunsell & Darley.*

Solicitor for the Irish Land Commission: *W. Alexander.*

G. Y. D.

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## IN RE J. O. WOODHOUSE, DECEASED.

## ANNESLEY *v.* WOODHOUSE.

(1891. No. 12,718.)

## WOODHOUSE *v.* WOODHOUSE.

(1894. No. 922.)

*V. C.*
1897.
May 3, 18.
June 2.

*Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *sect.* 2, *sub-sects.* 5-7; *sect.* 58, *sub-sect.* 1, *cl.* vi—*Settled Land Act*, 1890 (53 & 54 *Vict.* c. 69), *sect.* 11, *sub-sect.* 1—*Limited owner—Power to raise money by mortgage—"Person beneficially entitled to possession."*

Testator devised portion of his estates to trustees upon trust to pay out of the rents and profits a proportion of certain annuities and interest on legacies, and to accumulate the residue until a sum sufficient to pay certain debts, and the legacies had been formed, and then to pay the said debts and legacies. Subject to these trusts the testator devised the said estates in trust for his son J. for life, remainder to J.'s sons in tail male, with remainder to the testator's son C. for life. J. died unmarried. C., who was also one of the trustees of the will, went into possession as tenant for life. The trustees did not accumulate the rents and the testator's debts and legacies remained unpaid.

*V.-C.* 1897.

ANNESLEY v. WOODHOUSE.

On an application for an order authorizing C. to raise money under sect. 11 of the Settled Land Act, 1890 (53 & 54 Vict c. 69), for the purpose of discharging incumbrances upon the settled lands:—

*Held*, that, notwithstanding the trust for accumulation, C. was "beneficially entitled to possession" and entitled to exercise the powers of a tenant for life, although his enjoyment of the estate was intercepted by the provision for accumulation.

MOTION that Curran O. Woodhouse, as tenant for life, might be declared entitled to raise, by way of mortgage, a sum of money required for the purpose of discharging certain incumbrances on lands settled by the will of J. O. Woodhouse. The testator, whose estate was being administered in two actions which had been consolidated, by his will charged his debts and pecuniary legacies thereinafter bequeathed on his real and personal estate. He bequeathed certain legacies to his daughters, the interest on which testator directed to be paid from his death, but the principal not to be paid until the total amount thereof should be accumulated from the surplus rents of his estates. The testator directed his trustees to pay out of the rents and profits a proportion of certain annuities and interest on the legacies and to accumulate the residue until there was sufficient to pay the debts and legacies and then to pay them; and subject to the aforesaid trusts he devised his estates in trust for his son John for life, with remainder to John's sons in tail male, with remainder to the defendant Curran O. Woodhouse for life, with remainder to his sons in tail, with remainders over.

John Woodhouse died unmarried. The defendant Curran O. Woodhouse was one of the trustees of the will of the deceased. Two new trustees had previously to the motion been appointed by the Court, and Curran O. Woodhouse was discharged from being trustee. The trustees never accumulated the rents and profits, and testator's debts, and the legacies remained unpaid. Curran O. Woodhouse and his sisters, daughters of the testator, who were entitled to legacies charged on the estates joined in incumbering their respective interests.

*Ronan*, *Q.C.*, and *J. H. S. Russell*, for the trustees of the will of J. O. Woodhouse and for Curran O. Woodhouse, in support of the application.

*Morphy*, for the executor of the plaintiff F. G. Annesley:— The applicant is not a tenant for life in possession as such; he is not "beneficially entitled to possession": *Hickley* v. *Strangways* (1); *Hampden* v. *Earl of Buckinghamshire* (2); *In re Horne's Settled Estates* (3).

*V.-C.* 1897. ANNESLEY *v.* WOODHOUSE.

THE VICE-CHANCELLOR:—

June 2.

This is an application by Mr. C. O. Woodhouse, claiming to be tenant for life of lands settled by the will of his father, J. O. Woodhouse, for an order authorizing him to raise money for the purpose of discharging incumbrances upon the settled lands under the eleventh section of the Settled Lands Act of 1890. It appears that his doing so in the terms stated by him would be for the benefit of all persons interested in the settled lands, or who may become so interested. The question is whether he is a tenant for life, within the definitions of the Settled Lands Acts. The Act of 1890 is incorporated with the Settled Lands Acts, 1882 to 1889, and is to be read and construed with them as one Act. The second section of the Act of 1882, sub-section 5, provides that the person who is, for the time being, under a settlement beneficially entitled to possession of settled land for his life, shall be for the purposes of the Act the tenant for life under the settlement, and the seventh sub-section provides that a person being tenant for life within the previous definitions of the Act shall be deemed to be such, notwithstanding that under the settlement or otherwise the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent. This sub-section extends to cases where from the amount of incumbrances or charges there is nothing left to the tenant for life to enjoy beneficially, the words "beneficially entitled to possession" being considered as applying to the nature of the estate or interest created by the settlement, namely, an immediate right, as distinguished from one in reversion or expectancy. By clause vi of sub-section 1 of section 58 in the Act of 1882 it is provided that a tenant for his own life whose estate is subject to a trust for accumulation of income for payment of debts or other purpose shall, when the

(1) 34 Ch. D. 423. (2) [1893] 2 Ch. 531. (3) 39 Ch. D. 84.

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estate is in possession, have the powers of a tenant for life under the Act.

In the case of *In re Jones* (1), Bacon, V.C., and the Court of Appeal held that a tenant for life, who from the insufficiency of the settled lands to satisfy prior outgoings was not receiving, and could not receive, anything for his own benefit, still was a tenant for life under section 2, or a person having the powers of a tenant for life under section 58. The question must be decided on the terms of the settlement, and not according to what may turn out to be the beneficial enjoyment of the settled land. In the case of *In re Atkinson* (2) these provisions of the Acts came before Mr. Justice Pearson, and he stated his opinion that the words "entitled to possession" in sub-section 5 of section 2 mean entitled in possession as contra-distinguished from reversion, and that it is immaterial whether there are or are not any surplus rents which the person entitled can in fact receive, and that if he is entitled for his life to the potentiality of receiving the rents, he is the tenant for life within sub-section 5. The case of *Hickley* v. *Strangways* (3) is not inconsistent with the views expressed in the cases I have referred to, for there the devise was to trustees during the period of twenty years after testator's death upon trust out of the rents, &c., to manage his real estate, and cut timber, &c., and generally to deal with the premises as they might do if they were beneficial owners thereof, and to accumulate the rents and profits during the said period of twenty years, and invest same, and from the termination of said term of twenty years upon trust to settle his real estate, and all real estate purchased out of the accumulations, to the same uses as those declared by a deed of settlement referred to in his will under which the defendant became tenant for life on the death of the testator. Chitty, J., held that the defendant was not a tenant for life within the Act of 1882, on the ground that he was not tenant for life in possession, and he distinguished the case from those where a person is made tenant for life, and there is a trust inserted for accumulation which in substance is a mere incumbrance; and he held that the section shows that a trust as against him for accumulation will not deprive him of the powers under the Act, but that it was quite a different

(1) 26 Ch. D. 736. (2) 30 Ch. D. 605. (3) 34 Ch. D. 423.

thing with a person who is not tenant for life at all, and who is not tenant for life in possession. He held that in the case before him the trust for twenty years was not an incumbrance, because it could not be redeemed, or got rid of. The case went to the Court of Appeal, and was affirmed upon the ground that it was not the case of a mere charge or incumbrance which could be paid off and discharged by a tenant for life, and which he had the right to pay off, and obtain possession of his estate, but of a person whose right was not to arise for twenty years, and who had no right whatever to interfere with the present income or rent of the lands, and that the estate was not in possession, but in *futuro*, in remainder only, to arise and to exist in possession when the term of twenty years had expired.

The question therefore is, Whether, under the will of J. O. Woodhouse, the applicant is a present tenant for life in possession, and this depends, not on the consideration whether by reason of his estate being charged on incumbered to an extent which leaves nothing for him, he is unable to derive any benefit from it, but upon the effect of the will, giving him an estate for life, which would be in possession and enjoyment, but for prior charges; and secondly, whether he is a person entitled to the powers of a tenant for life, although his enjoyment is intercepted by the provision for accumulation.

The will begins by charging the testator's debts and pecuniary legacies thereinafter bequeathed on his real and personal estate. It then leaves legacies to his daughters, the interest of which is to be paid from his death, but the principal is not to be paid until the total amount thereof shall have been accumulated from the surplus rents of his estates as thereinafter provided. It then directs the trustees within twelve months from his death to ascertain and apportion his debts and legacies upon his real estate, so far as his personal estate should not extend. The testator then devises all his real estates to trustees upon trust, as to his Donegal and Down estates, to pay out of the rents and profits the proportion of the annuities and interest on the legacies, and to accumulate the residue until an amount should be accumulated sufficient to pay the proportion of his debts and legacies, and then to pay such proportion, and subject to the trusts aforesaid he devised his said

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estates in trust for his son John for life, with remainder to his first and other sons in tail male, with remainders to his daughters as therein, with remainder to Curran O. Woodhouse, the applicant for life, with remainder to his first and other sons in tail male and to his daughters as tenants in common. The will then contains corresponding limitations of the testator's Louth and Portadown estates, except that Curran is substituted for John, and John for Curran.

John died unmarried and without issue, and Curran thereupon became entitled to the estates devised first to John, and is now tenant for life of all the estates. The trustees of the will, of whom John and Curran were two, never accumulated any of the rents, and the testator's debts and legacies remain still unpaid. Then is he entitled in possession? The debts and legacies of the testator were expressly charged on the estates by the will, and I have held that the creditors and legatees are not now bound to wait for an accumulation to be commenced after so many years for payment of their charges. Curran O. Woodhouse has been in possession as tenant for life, and the fact of his life estate being incumbered or charged even to the full extent under sect. 2, subsect. 7, of the Act of 1882, does not preclude him, in my opinion, from having the powers of a tenant for life. In the same way, under sect. 58, his life estate being subject to a trust for accumulation of income for payment of debts and legacies does not preclude him from having the powers of a tenant for life. According to the cases I have referred he is tenant for life in possession for this purpose.

I arrive at this conclusion without losing sight of the fact that the applicant is one of the trustees of the settlement, and is alleged to have been guilty of a breach of trust in not having accumulated the rents for payment of the testator's debts and legacies. For any such breach of trust, if not sufficiently accounted for, he will be liable personally, and also any benefit he may derive under the settlement may be captured to make good any default. No attempt has been made to charge him or his estate for such liability, and I wish it to be distinctly understood that I do not express any opinion as to the existence or amount of such liability.

If he were now seeking to exercise the powers of the Act for his own benefit, or to prejudice the rights of any other persons deriving under the will, or interested in the testator's assets, I should refuse to sanction his exercise of his statutory powers. But as I am of opinion that the arrangement now proposed is for the benefit of all parties interested in the estates, I feel justified in sanctioning it. Any money to be so raised must be brought into Court and applied in payment of charges in due priority.

Solicitor for the executor of the plaintiff Annesley: *W. F. St. Leger.*

Solicitors for the trustees of the will: *H. R. Emerson.*

T. H. M.

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## IN THE MATTER OF THE ESTATE OF GEORGIANA GROVE WEST, OWNER AND PETITIONER.



*Deed—Construction—Annuity—Whether charged on* corpus *or on income only.*

By marriage settlement the intended husband granted lands to trustees, upon trust to permit him to receive the rents and profits for life, without impeachment of waste, and after his death to permit the intended wife to receive £300 a-year "out of the rents, issues, and profits thereof, for and during her life, without impeachment of waste, and for her jointure," and in lieu of dower, and "immediately after her decease" in trust for the settlor, his heirs and assigns. The settlor covenanted that the lands or any property to be taken in exchange thereof under a power of exchange therein contained should, during the life of the wife, produce the clear yearly sum of £300. In case of there being issue of the marriage living at the death of the settlor all his estate and property at the time of his death was charged with a sum of £3500 for such issue.

*Held*, by Ross, J., that the annuity was a charge only upon the rents and profits accruing during the annuitant's life.

*Held*, by the Court of Appeal, reversing the judgment of Ross, J., that the annuity was a charge upon the *corpus* of the settled property.

OBJECTION to the final schedule of incumbrances by mortgagees of the premises at Harcourt-terrace, in the county of Dublin,

*Ross, J.* 1896. *In re* West's Estate.

claiming under George White West, deceased. The question raised by the objection was whether an annuity of £300 a-year provided for Mrs. West, by settlement dated the 17th August, 1840, was charged upon the *corpus* of the estate or on the rents and profits only.

By this indenture of settlement, which was made between George White West of the first part, Arthur Grove Annesley and Georgiana Grove Annesley, his daughter, of the second part, and the Rev. Augustus William West, and Richard Grove Annesley of the third part, being the settlement executed on the marriage of George White West and Georgiana Grove Annesley, reciting that George White West, was seised in fee-simple or otherwise, of an estate of inheritance in a plot of ground, with seven dwelling-houses thereon (known as Harcourt-terrace), in the county of Dublin, producing as then let to undertenants, the annual sum of £341 10*s.*, subject to a ground or head rent of £25, and was also seised of lands in the county of Cork, the said George White West, in consideration of the marriage portion of the said Georgiana Grove Annesley, granted to the said Augustus William West and Richard Grove Annesley the said plot of ground known as Harcourt-terrace (described by a metes and bounds), to hold to the said Augustus William West and Richard Grove Annesley, their heirs and assigns, upon trust to pay and satisfy the yearly rents and outgoings; and from and after the solemnization of the marriage to permit and suffer the said George White West and his assigns to receive the rents, issues, and profits thereof for his life, without impeachment of waste, and "immediately after the decease of the said George White West, then to permit and suffer the said Georgiana Grove Annesley and her assigns to receive and take the annual sum of £300 out of the rents, issues, and profits thereof for and during her life, without impeachment of waste, as and for her jointure in lieu, bar, and full satisfaction of and for all dower and thirds at Common Law which she might otherwise have or claim in or out of any freehold, lands, tenements, or hereditaments which he the said George White West at any-time during said intended coverture shall be seised, or which he shall be entitled to, for any estate of freehold inheritance to which dower is incident, and immediately after the decease of the said

Georgiana Grove Annesley, in trust for the use of the said George White West, his heirs and assigns, for ever." The said George White West *inter alia* covenanted with the said Augustus William West and Richard Grove Annesley, their heirs, executors, administrators and assigns, that the said plot or parcel of ground (*i.e.* Harcourt-terrace), and the houses erected thereon, or other property to be taken in exchange thereof, or purchased with the produce thereof, or with any fines taken pursuant to the power thereinafter contained, should "during the lifetime of the said Georgiana G. Annesley produce the clear yearly sum of £300 sterling over and above head rent and all outgoings." In case there should be any issue of the said marriage living at the death of George White West, all the estate and property of which he should die seised of or entitled to was charged with £3500 for a provision for such issue, subject to appointment by him, and in default of appointment in equal shares. Powers of sale and exchange were vested in the trustees, and it was provided that the trustees should stand possessed of any lands acquired by re-investing the proceeds of sale or fines taken upon leases of the said premises at Harcourt-terrace, or lands and premises taken in exchange for the same, upon trust for securing the jointure thereinbefore provided for the said Georgiana Grove Annesley, in the same manner as the said plot or parcel of ground, and houses erected thereon, thereby vested in the said parties.

There were children of the marriage who survived George White West.

*The Right Hon. The Macdermot, Q.C.* (with him *W. M. Jellett*), for the objectors:—

There is here a limitation of the *corpus* of the estate to other uses "immediately after" the death of the annuitant, an expression relied on in *Foster* v. *Smith* (1) as showing that the annuitant had a charge on the rents only which accrued during her lifetime.

In *Birch* v. *Sherratt* (2) the gift over was "subject to" the

(1) 1 Ph. 629. (2) L. R. 2 Ch. App. 644.

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annuity—words which do not occur here, and except for which Lord Cairns was of opinion that the annuity would have only been a charge upon the income.

In *Stelfox* v. *Sugden* (1) where the annuity was held not to be a charge on the *corpus*, the Court relied on the fact that the terms of the will showed that the testator believed that the trust property would produce an income more than sufficient to pay the annuity. The recitals in the settlement here prove that the settlor considered that the income would be adequate. A power to recover arrears by sale is not enough to charge the *corpus*: *Addecott* v. *Addecott* (2). Here there is a power of sale, but it is not given as a remedy to the widow.

The question was considered by Ormsby, J., in *Matthew's Estate* (3), where *Taylor* v. *Emerson* (4), a decision of Lord St. Leonards, was cited. *Wormald* v. *Muzeen* (5), referred to in the report of that case, note (3), was reversed on appeal (6).

In *Carmichael* v. *Gee* (7) there was a general and indefinite gift of an annuity, and though there was a dedication of a particular fund to provide it, the House of Lords held that there was no real separation of that particular fund from the residue of the testator's estate.

*Kelly* v. *Kelly* (8), and *Sheppard* v. *Sheppard* (9), are cases where the annuity was held to be charged upon the income only. The authorities are collected in 1 Smith's Real and Personal Property, 6th Ed., p. 14, where the principles to be deducted from them are succinctly stated.

*Lawson*, for the younger children of Mrs. West, supported the objection, and cited *In re Pepper's Trusts* (10); Theobald on Wills (2nd Ed.), 636; *Taylor* v. *Taylor* (11); *In re Moore's Estate* (12); *In re King's Estate* (13); *In re Belton's Estate* (14).

(1) Johns. 234.
(2) 29 Beav. 460.
(3) 7 L. R. Ir. 269.
(4) 6 Ir. Eq. R. 224.
(5) 17 Ch. D. 167.
(6) 50 L. J. (N. S.) Ch. 776.
(7) 5 App. Cas. 588.
(8) 9 Ir. Ch. R. 103.
(9) 32 Beav. 194.
(10) 13 L. R. Ir. 108.
(11) L. R. 17 Eq. 324.
(12) 19 L. R. Ir. 365.
(13) 21 L. R. Ir. 273.
(14) [1894] 1 Ir. R. 537.

*O'Connor*, Q.C., and *H. Wilson*, for the assignees in bankruptcy of Mrs. West :—

First, an indefinite charge of an annuity on rents and profits *prima facie* creates a charge on the *corpus*. The rule in *Phillips* v. *Gutteridge* (1) was accepted by Monroe, J., as the true exposition of the law on this subject: *In re Moore's Estate* (2). There is nothing here to rebut the presumption that the settlor intended to charge the *corpus*: *Metcalfe* v. *Hutchinson* (3); *Salvin* v. *Weston* (4).

Secondly, there is no gift over, and the deed must be construed most strongly against the grantor, and most favourably towards the grantee. This is not a contest between two grantees of the same estate, or of an estate put in strict settlement. Subject to the annuity there is a mere reservation of the estate to the grantor. He could have alienated the lands, and so defeated the covenant *quoad* them.

Thirdly, the words "without impeachment of waste," which can have no technical meaning applicable to the subject matter, are meaningless except as an indication that the gift of the annuity was to be enjoyed in the fullest manner that the settlor was capable of giving effect to it.

*W. M. Jellett*, in reply, cited *Parker* v. *Harvey* (5). [He was stopped by the Court.]

Ross, J. :—

I need not trouble you further, Mr. Jellett. Although the question is an important one, involving the right to a considerable amount of money, as the authorities have been thoroughly discussed during the argument, I am in a position to dispose of the matter at once.

The question here is whether an annuity created under a deed of 1840, subject to the settlor's life estate, is merely charged on rents and profits accruing during the lifetime of the annuitant, or

(1) 3 De G. J. & S. 332.
(2) 19 L. R. Ir. 365.
(3) 1 Ch. D. 591.
(4) 14 W. R. 757.
(5) 4 Br. P. C. 604.

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whether it is charged on the *corpus* of the trust property. A third construction that it is a continuing charge on rents and profits has not been much pressed, and in the view I take it is not necessary for me to discuss it.

The question is always a question of intention. Numerous cases have been referred to; and in this great mass of authority scarcely any settled principles have been arrived at. In nearly every case the decision has turned upon the special words used and the connection in which they occur, affording no light whatever in cases where the words used are different or are used in a different connection. What few principles are arrived at are subject to exceptions so numerous and so minute as to be scarcely recognisable as principles at all. I think the following have been established:—Where there is an indefinite and unlimited charge of the annuity upon income an intention should be inferred to charge the *corpus;* and this is particularly so when there is a gift over directed to pass "subject to" or "after payment of" the annuity. Where the *corpus* is treated as remaining entire or has been put into strict settlement, or dealt with in terms which show that it was to go over immediately or undiminished, the charge is on the income alone. Where a fund is set apart to meet the annuity, or part of an estate is segregated for a similar purpose, the annuity is *prima facie* a charge on the income alone. I take it that these propositions are established by the cases, but subject to exceptions which can be created by the smallest turn of an expression. The Courts are often obliged to infer an intention when it is far from clear that the settlor had ever actually formed any intention on the subject at all. The question arises from the failure of the income to supply the annuity, an event which it is often plain did not present itself to the settlor's mind. But that difficulty is not met with here. It was definitely before the settlor's mind that the income might prove deficient, and he provided for such possible deficiency in the way I shall afterwards point out.

As to the sale and exchange clause, it has been strongly relied on by both sides. Mr. O'Connor has relied on it because it appears that the lands purchased or taken in exchange are to be a security for the jointure. The Macdermot replies that they are to be a security, but only in the same manner as the lands first

settled. That clause gives me no assistance. If there had been a gift over introduced by the words "subject to" or "after payment of" the annuity, it would probably remove all difficulty; but these words are not here.

In endeavouring to ascertain the intention of the parties to the deed I am entitled to consider two things:—first, the words of the instrument; secondly, the surrounding circumstances and the subject-matter with which the instrument deals. The settlor was possessed of large property at the time of the settlement. He segregated a portion of his property, the rents and profits of which so far as he could calculate would suffice to supply the annuity. It is recited in the settlement that there was a rental of £345 10*s.*, subject to a head-rent of £25. There is a small balance left undisposed of to meet contingencies such as repairs, failure of tenants, and such like. The trustees have the legal estate, it is true; but the main object of putting this kind and quantity of property into settlement was to provide an income out of which Mrs. West's annuity could be paid. The trust is to permit the annuitant to receive £300 a-year out of the rents and profits without impeachment of waste. I cannot say that I have arrived at a satisfactory conclusien as to which contention these latter words assist. Mr. O'Connor says that they indicate an intention on the part of the settlor to make the grant in as favourable a manner as possible to the widow. The Macdermot says these words are applicable to a tenancy for life, that they were used immediately before in connection with the husband's life estate, and show that Mrs. West was substantially to be tenant for life of the premises. Neither argument weighs very much with me. But on the death of this lady the property is to pass over immediately to the settlor, his heirs, and assigns. The words of the deed are "and immediately after the decease of the said Georgiana Grove Annesley in trust for the use of the said George White West, his heirs and assigns, for ever." This form of expression makes strongly in favour of the contention that the annuity is not on the *corpus*: *Foster* v. *Smith* (1).

Now, I come to the most important point of all. It is plain

(1) 1 Ph. 629.

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that the settlor contemplated the possibility of a deficiency, and he provided for it, not by giving a direction to sell any of these houses to meet the deficiency, but by a personal covenant that the property should produce £300 a-year. That personal covenant could be conveniently enforced by the lady the moment any deficiency of income arose.

The very thing that has actually occurred was contemplated, and the remedy provided is not by selling portions of the premises from time to time. I am assisted by the case last cited by Mr. Jellett (1), the case of a personal covenant substantially the same as we have here, and there it was held that when a deficiency occurred that deficiency must be supplied by lands of the covenantor other than the jointure estate. Taking all these things together, I am of opinion that the intention was to charge the annuity on the income alone, that in the event of a deficiency recourse was to be had to the covenant, and that immediately after Mrs. West's death the undiminished property was to pass over to the settlor absolutely.

Where there are so many authorities, and where the distinctions are so fine, I cannot say that my mind is free from doubt; but I think my view is fortified by *Birch* v. *Sherratt* (2). [His Lordship read the marginal note.] Now this authority is in favour of the annuity being a charge on the capital, but when Lord Cairns' judgment is examined we find that if it had not been for these words "from and after the payment of the said annual sum of £100, and subject thereto," he would have held it to be a charge on the income only, and that too in a case where there is a trust to levy and raise. "If the will," he says, "had stopped at the end of the direction to pay the annuity, the words would not appear to me, as at present advised, sufficient to constitute a continuing charge upon the income, or a charge upon the *corpus* for the payment of this £100 a year. I do not mean to say there may not be cases in which a direction to pay out of a recurring income, or out of rents, may not indicate an intention to create a perpetual charge, but taking the words by which this annuity is given, and judging of them alone, I think they amount

(1) *Parker* v. *Harvey*, 4 Br. P. C. 604. (2) L. R. 2 Ch. App. 644.

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to nothing more than a direction to pay the annuity out of the income if the income was sufficient." He rests his decision on the words "from and after," and "subject thereto." If these words had not been there his judgment would have been in favour of the opposite contention. It is true that there was an express gift over of the property in that particular case, and not in this. Here it passes to the settlor himself. I quite see the force of the distinction, but after giving full weight to it, the case remains in my opinion a strong authority in favour of The Macdermot's contention.

I therefore decide that the annuity is a charge only on the income accruing during the annuitant's life, and I direct that the schedule shall be altered accordingly.

W. G.

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*Appeal.*
1896.
Dec. 6.

The assignees in bankruptcy of Mrs. West appealed to the Court of Appeal (Lord Ashbourne, C., Barry and Walker, L.JJ.).

*O'Connor*, Q.C., and *H. Wilson*, for the appellants.

*The Right Hon. The Macdermot*, Q.C., and *W. M. Jellett*, for the objectors.

*Lawson*, for the younger children.

The arguments were the same as those reported in the Court below.

LORD ASHBOURNE, C. :—

This is an appeal from an order of Mr. Justice Ross, dated May 13, 1896, allowing certain objections, and involves the question, whether the arrears of a certain jointure are a charge on the *corpus* of the purchase money of certain lots sold in the matter.

The question turns upon the construction of the settlement of August 17, 1840, which (amongst others) contained a recital that

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certain lands, situated in the suburbs of Dublin, produced as then let to sub-tenants, an annual sum of £341 10*s.*, subject to a head-rent of £25, and then assigned all the interest in the lands to trustees, their heirs and assigns for ever, upon trust for George White West for life, and immediately after his decease, "to permit and suffer" the intended wife (the owner and petitioner in the matter) "to receive and take the annual sum of £300 out of the rents, issues, and profits thereof, for and during her life without impeachment of waste, as and for her jointure, and in lieu bar and full satisfaction of and for all dower and thirds at Common Law": and "immediately after her decease in trust for the said George White West, his heirs and assigns, for ever." The deed contained no provision for the payment of any surplus over the £300, but did contain full powers of sale and exchange for securing the jointure, and also a covenant by the said George White West that the said lands should and would during the lifetime of the said intended wife produce the clear yearly sum of £300. Considerable arrears of this jointure after the death of George White West accrued due, and having been placed on the schedule in the Land Judge's Court as a charge on the *corpus*, an objection was filed, based on the contention that the jointure was only charged on the rents and profits. Mr. Justice Ross, after argument, yielded to the objection, and the question discussed before us was whether his construction of the settlement was the correct one. It is a question of intention to be gathered from the whole settlement. From the parts of it to which I have referred, it is to my mind clear that there was a distinct contract and purpose that the intended wife should have a jointure of £300 a-year secured on the lands. There is a recital that the rental of the lands would produce rather more, together with a covenant that the lands would produce annually the sum of £300. All the interest in the lands is assigned to trustees. If the jointure was only charged on the rents and profits it is manifest that it would be in constant peril and most inadequately secured. The dominion given to the trustees and the powers of sale and exchange were calculated to strengthen the security if the jointure were charged on the *corpus*. It is urged that the covenant of George White West was intended to provide a security out of his personal estate, and that therefore

only the annual rents and profits of the lands were charged. I do not so regard the covenant. I hold it to be a further proof of the governing idea, that a jointure of £300 a-year was charged on the *corpus* of the lands and was, under no circumstances, to fail if the resources of George White West could secure it. The fact that the settlement contained a limitation of the lands after the death of the jointress was relied upon as an argument that only the rents and profits were charged. But that limitation was only in favour of the settlor himself and did no more than would be effected by a resulting trust. The settlor could never be heard, arguing that the jointure and its security must yield to a limitation in favour of himself.

Numerous authorities were cited, but I do not deem it necessary to refer to more than two or three of them. *Foster* v. *Smith* (1) was probably the case most insisted on by the respondents, but it is entirely distinguishable as a new trust in favour of new parties arose there on the death of the lady who took the annuity. The case of *Tyndall's Estate* (2) so explains the case of *Foster* v. *Smith* (1), and is of the highest authority, being the decision of Lord Chancellor Brady and Lord Justice Blackburne sitting in the Court of Appeal. The facts of the case make it a direct authority upon the question before us. Lord Chancellor Brady used these words in giving judgment:—"Now it was argued here upon the form of the instrument that a new trust arose upon the death of this lady. That appears to me to be a mere form. The substance of the matter is that she was to be entitled as against her husband, and therefore I cannot consider the form of the instrument in the present case as at all similar to that of *Foster* v. *Smith*" (1). Lord Justice Blackburne also said, "The primary object is to fulfil a contract, which must be defeated by the limited construction of the powers of the trustees contended for by the appellant." This case was followed in *Carter* v. *Salt* (3), where the Master of the Rolls, Mr. Walsh, a most able Judge, gave a learned examination of the authorities, and held that an annuity out of "the rents, issues, and profits" was, under the circumstances, charged on the *corpus*.

(1) 1 Phillips, 629. (2) 7 Ir. Ch. R. 181. (3) Ir. R. 1 Eq. 97.

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The case of *In re Kelly* (1), where the annuity was held to be charged only upon the rents and profits, proceeded on the ground that the lands after the death of the annuitant were limited over on other and distinct trusts. Other cases were decided on the ground that there was a gift over of the surplus income during the life of the annuitant. But each case must stand on its own facts and circumstances, and the intention of each instrument must be gathered from its construction as a whole.

For the reasons I have given, I have reached the conclusion that the marriage settlement of 1840 was intended to charge and did charge the jointure on the *corpus* of the settled property, and that, therefore, the appeal must be allowed with costs, and the case remitted to the Land Judge, with the declaration that the jointure is so charged.

Barry, L.J., concurred.

Walker, L.J. :—

I concur entirely in one observation of Mr. Justice Ross, viz. that decided cases throw little light upon such a question as we have to decide. Certain general rules may be collected from these cases, and Mr. Justice Ross has accurately stated some of them; but it is in the application of those rules to this case that I feel compelled to differ from him.

I do not understand the learned Judge to say that a reference to yearly or annual rents, as the source of payment of an annuity, is a determining factor as to whether a charge on the *corpus* exists, but he grounds his decision mainly upon the form of the gift to the husband and his heirs after the wife's death; and, secondly, upon the existence of the personal covenant given by the husband, which, he says, shows not only that he contemplated a deficiency, but that he made one, and only one, provision to meet such a case.

I have formed the view that the existence of the covenant in the present settlement, having regard to its scope and object, furnishes rather an argument against the contention of those who claim this estate through the husband.

(1) 9 Ir. Ch. R. 103.

The settlement of the 17th August, 1840, so far as regards the question we have to decide, had no other object and effect than to give the wife, as a purchaser, a jointure of £300 per annum, and subject to that, whether charged on the *corpus* or not, to leave the property with the settlor. He is in no sense a purchaser of what he takes back. It is necessary to state the provisions of the settlement. It is made between the intended husband of the first part, the intended wife and her father of the second part, and trustees of the third part. It recites the intended marriage, and that Mr. West was seised of a plot of ground with seven houses erected on it, "producing, as now let to the undertenants thereof, the annual sum of £341 10*s.*, or thereabouts, subject to a ground or head rent of £25." And he conveys to the trustees and their heirs all these premises, with all his estate and interest, to hold to them and their heirs, "subject to the uses and trusts hereafter declared and expressed of, and concerning the same, that is to say," upon trust (subject to head rents) to permit Mr. West to receive the rents for his life without impeachment of waste, "and immediately after the decease of the said George White West, then to permit and suffer the said Georgiana Grove Annesley and her assigns to receive and take the annual sum of £300 out of the rents, issues, and profits thereof, for and during her life without impeachment of waste, as and for her jointure in bar of dower and thirds; and immediately after the decease of the said Georgiana Grove Annesley, in trust for the use of the said George White West, his heirs and assigns for ever." Mrs. West's father then conveyed to the trustees lands of his, by way of mortgage, to secure a sum of £1500, as a part provision for the issue of the marriage; and Mr. West covenanted with the trustees that the plot of ground and houses, "or other property to be taken in exchange thereof, or to be purchased with the produce thereof, or with the money taken by way of fines therefor, pursuant to the power or provision hereinafter contained in that behalf, will during the lifetime of the said Georgiana Grove Annesley produce the clear annual sum of £300 over and above all head rent, renewal fines, and other outgoings"; and also in case there should be any issue of the marriage living at his decease, all the lands of which he should die seised

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should stand charged with a sum of £3500 (of which the £1500 should form part), as a provision for such issue as therein mentioned. There was then vested in the trustees a power of sale and exchange over the premises, with a power of investment over the proceeds; and it was declared that the trustees should "stand seised or possessed of the lands and premises so to be purchased or taken in exchange, and of the monies to accrue from such sale or disposition, fines or forfeits, and the securities in which from time to time the same may be invested and secured upon trust, and for the purpose of securing the jointure hereinbefore provided for the said Georgiana Grove Annesley in the same manner as the said plot or parcel of ground and houses erected thereon."

It will be observed, as I have already said, that the husband is not a purchaser of the estate which goes back to him, and the estate is not limited to purchasers (such as children) after providing for the wife's jointure. There is no contract for value, dividing the estate between the jointress and remaindermen; and therefore, so far as the object of the settlement is concerned, there is no person who under a contract having the weight derived from marriage consideration can call for the estate to go over in its integrity to him under a new trust for value.

There is not even during the life of Mr. West any gift of the surplus rents over the £300 per annum. Take the case of one year adequate, the next deficient, and the third more than adequate, will the heir of Mr. West take the surplus rents of the third year, and, again, if the property was sold and the proceeds invested, and only enough of income therefrom existed to produce say £280 per annum, would Mrs. West be unable to resort to the capital though it was held in trust "for the purpose of securing the jointure hereinbefore provided?" The only value I attach to this last clause is that it falls in more appropriately with a construction of the settlement which would make the annuity a charge on the *corpus*. It is not easy either to give any construction to the words "without impeachment of waste" attached to the status of the annuitant. They seem directed to the conferring on her of large powers, but it would be unsafe, I think, to attach any weight to them.

I do not think cases on wills furnish the same guide for ascer-

taining the intention as those on a settlement like this. Under wills all are volunteers, and we have only to see how the estate has been partitioned off between an annuitant and those claiming the estate on which it is charged—whether it is the case of an annuitant and residuary legatee or an annuitant and a person claiming the estate in its integrity after the rents have been applied; both are equal objects of bounty, and the scale will be more easily turned for instance by a gift of surplus rents during the life of the annuitant in the one case, or the use of the words "subject to" in the other when attached to the gift over. In such a case, too, the words "immediately after" if they occurred in a gift over would be of more force. In truth, language may be readily used—and it would be easy to multiply illustrations—by which all difficulty as regards either contention would be removed.

For instance if it could be shown that the case is like that of *Baker* v. *Baker* (1)—one of a fund or property divided into two parts limited to go over in its integrity to a remainderman, then *Baker* v. *Baker* (1) and *Foster* v. *Smith* (2) could be relied on with much force; but I think the learned Judge has not given sufficient weight to the character of this settlement and the relative position of the settlor and jointress, or the relevancy to the case of the decision in *Re Tyndall* (3) which has features similar to the present. There, too, the gift over was preceded by the words "and from and immediately after the decease of the said Anne Buckley then in trust to assign" and make over to the said James Lewis the lands.

The Lord Chancellor has read the observations of Lord Chancellor Brady, at p. 186 of the report, and I shall not repeat them. But then the learned Judge in the Court below relies on the personal covenant given by the husband as furnishing the only remedy intended to meet a deficiency; and so in this Court The Macdermot pressed the same view and relied upon some observations of Lord Cairns in *Birch* v. *Sherratt* (4) where he says, "It is also possible that if it had been pointed out to the testator that the income might become deficient he might have made arrangements of a different kind from those which he has made"; and he argued

(1) 6 H. L. Cas. 616.
(2) 1 Phill. 629.
(3) 7 Ir. Ch. R. 186.
(4) L. R. 2 Ch. App. at p. 647.

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that here this arrangement had been made. *Birch* v. *Sherratt* (1) has itself no bearing on the case before us, but I do not think the observations of Lord Cairns are relevant to the question whether the covenant does or does not furnish an intention that the estate shall go to the husband's heirs after the wife's death free from all claims in respect of the jointure. I think this covenant furnishes rather an argument in favour of the appellants upon this particular settlement, because it shows that as the estate was to go back to him and his heirs, so he or his assets in all events should be liable for a deficiency, thus evidencing an intention to make the jointure paramount to all his own claims on the estate. Those very lands would be real assets to meet the breach of covenant. There are of course no words in the deed stating that the lands are to go over subject to the annuity, but I collect from the whole deed and its character an equivalent intention.

We shall therefore discharge the order of Mr. Justice Ross so far as it declares that the arrears of the annuity of the owner Georgiana Grove West are not a charge upon the *corpus* of the purchase-money of lots 1 to 8 sold in this matter, and declare that they do form a charge upon the *corpus* of the proceeds.

Solicitors for the assignees in bankruptcy of Mrs. West: *Michael Larkin & Co.*

Solicitors for the objectors: *St. George & Browne.*

Solicitor for the younger children: *Vance.*

G. Y. D.

(1) L. R. 2 Ch. App. 644.

## IN RE KING, DECEASED.

## KING *v.* KING.

*M. R.*
1897.
May 18.

*Estate* pur autre vie—*Devolution of estate—Special occupant—Intestacy.*

A lessee of lands, which had been demised to him, his heirs, executors, administrators, and assigns, for lives and thirty-one years concurrently, by his will devised to trustees in trust for *A. B.*, without any words of limitation in relation to either the legal or equitable interest. *A. B.* died intestate. One of the lives mentioned in the lease was still in existence. The term of years had long since expired.

*Held*, that the heir-at-law and not the personal representative of *A. B.* was entitled to the estate *pur autre vie*.

*Wall* v. *Byrne* (2 J. & L. 118) followed (1).

By indenture of lease dated 31st October, 1857, Eyre Coote demised the lands of Skiddoo to James Bride, his heirs, executors, administrators, and assigns, for three lives (therein named), or for and during the term of thirty-one years, at the yearly rent of £354 6*s.* 5*d.* By his will dated 17th February, 1886, James Bride devised to his executors and trustees (therein named) all his estate and interest in his farms of Skiddoo and Bealanstown, and all other his real and personal estate upon trust to pay his debts and funeral and testamentary expenses. He then gave, devised, and bequeathed to his said executors and trustees all his real and personal estate and chattels real, to hold the same subject to the trusts following; that is to say, as regards his dwelling-house, offices, and lands at Skiddoo, (subject to an annuity thereinafter mentioned) in trust for his nephew Nicholas King; and he appointed his said nephew Nicholas King the residuary legatee of all his estate and property whatsoever.

James Bride died 2nd May, 1890, and on 19th July, 1890, probate of his will was granted to the executors therein named.

Nicholas King died intestate on 29th October, 1895, and letters of administration of his personal estate and effects were

(1) See *Sheppard* v. *Manning*, [1897] 2 Ch. 67.—[REP.]

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granted to his brother Richard King, the defendant, on 14th November of the same year.

The heir-at-law of Nicholas King was his brother John King, who was a person of unsound mind so found; and, by order of the Lord Chancellor, Mrs. Anne Mooney, a sister of the lunatic, was appointed committee of his estate.

One of the lives mentioned in the lease of 1857 was still in existence.

The plaintiff issued a summons for the administration of the personal estate of Nicholas King.

By order dated 22nd June, 1896, the matter was referred to the Chief Clerk for accounts and inquiries.

The 5th paragraph of the Chief Clerk's certificate was as follows:—"The personal estate of the said intestate outstanding or undisposed of consists of the particulars set forth in the second schedule hereto. The plaintiff claims that the lands of Skiddoo, containing 319A. 0R. 38P., statute measure, situate in the barony of Nethercross and county of Dublin, held under lease dated 31st October, 1857, from Eyre Coote to James Bride for three lives, of whom one is still surviving, to which the intestate was entitled at the date of his death, passed upon his death intestate to his administrator, to be distributed as personal estate, and not to John King, the heir-at-law of the intestate; and at the request of the plaintiff's solicitor such claim is submitted to the Court on further consideration."

*O'Connor*, Q.C., and *D. Kehoe*, for the plaintiff.

*Carton*, Q.C., for the committee of the lunatic heir-at-law.

*Matheson*, Q.C., and *Battersby*, for the defendant.

*Ignatius O'Brien* and *Rynd*, for other parties interested.

The arguments are sufficiently referred to in the judgment.

THE MASTER OF THE ROLLS:—

The lands of Skiddoo in question were leased by Eyre Coote to James Bride, his heirs, executors, administrators, and assigns

in 1857, for lives, and 31 years concurrently; and by James Bride's will devised to trustees for Nicholas King, there being no words of limitation in relation either to the legal or the equitable interest. Nicholas King died intestate. The question for decision is stated in the 5th paragraph of the Chief Clerk's certificate as follows:—The plaintiff claims that the lands of Skiddoo . . . . held under lease of 31st October, 1857, from Eyre Coote to James Bride for three lives, of whom one is still surviving, to which the intestate was entitled at the date of his death, passed upon his death intestate to his administrator to be distributed as personal estate, and not to John King the heir-at-law of the intestate.

I think it clear that the words "heirs, executors, administrators, and assigns" in the lease are to be construed *singulatim*, that is, that the word "heirs" is to be connected with the estate for lives; and the words "executors, administrators, and assigns" with the term of years. The case is therefore as if there had been no term, and the demise had been to James Bride and his heirs, *pur autre vie*.

The question then, is, whether an estate *pur autre vie* limited to a man and his heirs, and devised by his will to another without words of limitation, will descend to or devolve upon the heir of the devisee as special occupant, or go to the executor by virtue of the statute or otherwise.

Of course if it had been a fee-simple or other descendible freehold there could be no doubt. The question depends wholly upon the peculiar nature of title by occupancy in relation to estates *pur autre vie*.

*Brenan* v. *Boyne* (1) contains an instructive reading upon the characteristics of estates *pur autre vie;* but has no bearing upon the present question. It was the case of assignment not by will, but by deed not containing words of inheritance (see pp. 103, 104 of the report); and the nature of the estate of the grantee was immaterial for the decision of the case.

*Wall* v. *Byrne* (2) is exactly in point. It came before Lord St. Leonards. The facts were that Wall being entitled to the

(1) 16 Ir. Ch. R. 87. (2) 2 Jon. & Lat. 118.

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lessee's interest in certain lands, held under a lease for lives renewable for ever, in 1831 obtained a renewal thereof; and thereby Robert Johnston, in whom the reversion was then vested, demised the lands to him, his heirs, and assigns, for the term of three lives therein named, with a covenant for perpetual renewal. It differs from this case in the fact that there was there no concurrent term of years, but it does not make any difference in the decision. In September, 1832, Wall made his will, and gave, devised, and bequeathed all his real, freehold, and personal property which he possessed or was entitled to, unto his wife and children (naming them) share and share alike, and he died shortly afterwards. Two of the children of the testator who survived him died intestate and unmarried, and as regards their shares in the estate *pur autre vie*, devised by the testator, it was contended that they vested in their respective personal representatives. The matter was argued by the late Master Fitz Gibbon; and though the Lord Chancellor said that he could not permit any argument on the question as the matter was closed by authority, yet any one who knew that distinguished counsel would be aware that it was not likely that any thing would prevent him from presenting his client's case to the Court. At any rate he got as far as citing *Lewis* v. *Lewis* (1); and the Lord Chancellor says:—"If ever a point was closed by decision it is this; that where a man has an estate *pur autre vie*, limited to him and his heirs, and devises that estate, by words which, without words of limitation, would pass the *quasi* inheritance—as the words here would—and the devisee dies intestate, the persons to take are the heirs and not the personal representatives of the devisee. The point was so decided in this country many years since; and that decision has been followed in England; and many opinions have been given on it." Mr. O'Connor in his argument pressed me that it was not easy to find the English authority to which Lord St. Leonards refers. Lord St. Leonards says:—"I must therefore decline to hear the question argued; for I will not be auxiliary to unsettle settled opinions." He then distinguished *Lewis* v. *Lewis* (1) where the devise was to a man and *his assigns*, which the Chancellor thinks makes a difference;

(1) 9 M. & W. 662.

"but," he says, "in this case the devise is in general terms, and in words which are sufficient to pass the entire interest under the lease. If this had been a fee-simple estate, it would have gone to the devisee and his heirs under the terms of this devise. The testator gives all his interest in the lands to his devisees; and both law and good sense require that they should take the same interest which he himself had. It is a settled point, and not now open to be disturbed. It was settled by a case in this country, decided upon great consideration, which has been since recognized and acted on. I shall therefore follow those authorities, and leave the error, if it be one, to be corrected elsewhere."

*Wall* v. *Byrne* (1) has never been overruled. It is referred to in the judgment in *Brenan* v. *Boyne* (2), though not discussed or criticized: and it is supported by *Blake* v. *Jones* (3) in the Exchequer Chamber.

In that case originally an estate *pur autre vie* was demised to a man, his heirs, and assigns, with a covenant for perpetual renewal, and he made a will which contained this clause:—"I give and divide all my estate and interest in the several lands which I hold . . . to my three sons, Mark Blake, Manus Blake and Charles Blake: and I order and direct that, so soon after my death as convenient, all my said farms shall be set to solvent tenants by my executors, and that the profits arising out of them shall be divided share and share alike among my said three sons"; and then followed consequential directions. The testator died in 1794, and on his death his three sons entered on the lands and became seised. The question arose as between the heir-at-law and personal representative of Manus Blake who died in 1801 intestate and without issue. The lessor of the plaintiff was the heir-at-law of Manus Blake, and Charles Blake the defendant had taken out administration to him. There was judgment for the heir-at-law, and a writ of error having been brought that judgment was affirmed. That is a decision of the Court of Error in 1813. The facts are taken from the record.

*Philpotts* v. *James* (4) is probably the case referred to by Lord St. Leonards. In that case the facts were that there was a lease

(1) 2 J. & Lat. 118.
(2) 16 Ir. Ch. R. 87.
(3) 1 H. & Br. 227, note.
(4) 3 Doug. 425.

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*pur autre vie* to a man, and his heirs, and assigns. The lessee died, having devised the premises by will to one who happened to be his heir-at-law with a direction to renew the lease. It was held that the heir-at-law of the testator was entitled to the estate *pur autre vie.*

*Wall* v. *Byrne* (1) was decided in 1845. It has been acted upon in this country ever since; and in Latouche's Furlong on the Law of Landlord and Tenant, the rule is thus stated at pages 242, 243:—"Where a man who has an estate *pur autre vie* limited to him, and his heirs, devises that estate by words, which without words of limitation, would pass the *quasi* inheritance, and the devisee dies intestate, the persons to take are the heirs, and not the personal representatives of the devisee."

The cases relied on for the contrary view were *Philips* v. *Philips* (2); *Lewis* v. *Lewis* (3), and *More-Smyth* v. *Mountcashell* (*Earl of*) (4).

The present point did not arise in *Philips* v. *Philips* (2). The estate *pur autre vie* there was *created* by the will of William Philips. There were no words of limitation in the gift: and the question arose as between the personal representative of the devisee, who died in the lifetime of the *cestui que vie*, and the real representative of the testator who claimed the estate as undisposed of (see pp. 38, 40).

*Lewis* v. *Lewis* (3) was cited to Lord Chancellor Sugden in *Wall* v. *Byrne* (1), and distinguished by him upon grounds which are very clear.

In *More-Smyth* v. *Mountcashell* (4) the question which arises here did not occur. There was no will in the case. It could not in the present case be disputed that if Eyre Coote had granted the interest by deed, without words of limitation, to James Bride, the interest would have passed upon the death of the grantee to his personal, and not to his real, representative, there being no special occupant named. The question is whether the effect of the devise is not in effect to supply the word "heirs," and so a special occupant, without more; that is, the case must turn upon whether there is a distinction

(1) 2 J. & Lat. 118.
(2) 1 P. Wms. 34.
(3) 9 M. & W. 662.
(4) [1896] A. C. 158.

between a will and a deed in this respect. Cases upon deeds or executory agreements have therefore no direct application. The assumed ground of the distinction, whether well-founded or not, is that in a deed words of inheritance are necessary, and must be expressed in order to create a descendible freehold; while, in a will, and particularly in a will since the Wills Act, such words are not necessary, or are supplied; and if supplied in one case may also be supplied in another, viz. an estate *pur autre vie*.

In the Court of Appeal in this country *More-Smyth* v. *Mountcashell* (1) was decided mainly upon a ground not argued before me, viz. the circumstance that the estate in question had belonged to an infant whose guardians, it was held, had no power to alter its transmissible quality. In the House of Lords, though the Lord Chancellor treated the case as one of extreme simplicity, several of the learned lords expressly based their judgments upon the same grounds as were expressed by the Court of Appeal here: and I think reliance was placed in the argument here only upon the judgment of Lord Davey. Lord Davey does say that the transmission of an estate *pur autre vie* depends on the terms of the last conveyance. He says that is certainly so in the case of a deed. When he refers to the "last conveyance," no doubt he had in his mind a passage in the judgment of the Lord Chief Baron referring to Jarman. That author says (p. 59):—"It seems now to be admitted that the devolution of the estate is regulated by the words of limitation contained in the last conveyance, without regard to the mode of its original creation." But Lord Davey limits his remark to the case of deeds, and does not express any opinion as to devises. I am therefore unable to see that the case rules the present. It is to be observed, too, that Jarman does not quote or refer to *Wall* v. *Byrne* (2), or any of the Irish cases bearing upon the subject.

I should of course have yielded to any indication in the House of Lords even without a decision that *Wall* v. *Byrne* (2), *Philpotts* v. *James* (3), and the Irish cases in the Exchequer Chamber and elsewhere were wrong. Indeed, if the case were *res nova*, I should have myself taken the view that even under a will the heir could not take as special occupant without being expressly

(1) [1895] 1 Ir. R. 63. (2) 2 J. & Lat. 118. (3) 3 Doug. 425.

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named, while fully recognizing that in a devise not containing a limitation to heirs the whole estate and interest *pur autre vie* would pass to the devisee.

But when one remembers that for the greater part of a century the contrary view has prevailed: that titles have been sold and settled in an infinite number of cases on the faith of the correctness of the view in question; and that it has been accepted by the profession without question during so long a period in determining rights arising out of one of the most common of Irish tenures: I feel that I am bound to act upon the authority of the cases I have cited, and to decide in favour of the heir-at-law. It is clear to my mind that nothing short of an Act of Parliament ought to be allowed to alter a settled rule on which so many titles to estates in this country depend.

Solicitors for the plaintiff: *Tench & Reynolds.*

Solicitors for the defendant: *T. Gerrard & Co.*

Solicitor for the committee of the lunatic heir-at-law: *M. C. O'Meara.*

R. W. L.

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*V.-C.* 1896. Nov. 25.

*Appeal.* 1897. Jan. 13.

## CLANRICARDE *v.* RYDER.

(1896. No. 89.)

*Jurisdiction—Divisional Court—Chancery or Queen's Bench Division—Action for recovery of land—Equitable claim—Judicature (Ireland) Act*, 1877, *sects.* 36, 37, 38.

The plaintiff brought in the Chancery Division an action, claiming an account of what was due by the defendants to him for use and occupation of a certain agricultural holding, or, in the alternative, that the mesne rates payable by the defendants for wrongfully withholding the premises from the plaintiff might be ascertained and ordered to be paid by the defendants to the plaintiff; and to have it declared that the plaintiff was entitled to possession of the said holding, free from any claim or tenancy of the defendants, or alternatively, that the plaintiff was entitled to receive the rents of the holding from the defendants as "future tenants" within the meaning of the Land Law (Ireland) Acts. By his defence one defendant repudiated any tenancy or interest in the holding, and denied that he had ever claimed any such tenancy or interest. The other defendant, by his defence, claimed to be in possession of the holding, under an agreement with the plaintiff, whereby the plaintiff let to him the grazing of the lands for a fixed sum down to the 1st of May, 1887,

and whereby the plaintiff agreed to let the said lands to him as tenant from year to year, from the 1st of May, 1887, at a yearly rent to be fixed by agreement between the plaintiff and the said defendant, and that the said defendant was always ready and willing to carry out this agreement, on the faith of which he entered into and remained in possession of the lands, but that the plaintiff had failed to carry out his part of the said agreement and had refused to recognize any right of tenancy in the said defendant. Neither party made any application to have the action transferred to a Common Law Division. On the action coming on for trial, both parties being in attendance with their witnesses, the Vice-Chancellor dismissed the action without prejudice to any proceedings the plaintiff might be advised to take for recovery of the possession by ejectment, or for rents or mesne rates, or for use or occupation of the lands:—

*Held*, by the Court of Appeal, that there was no jurisdiction to dismiss the action, and that the case should be remitted to the Vice-Chancellor to proceed therein as to justice might appertain, either by hearing the case himself or by transferring it to a Common Law Division, with power to take the latter step either on the application of one of the parties or on his own motion.

TRIAL. The writ of summons was indorsed thus:—

"The plaintiff's claim is to have an account taken of what sum is due by the defendants to the plaintiff for use and occupation of the house and lands of Gortnakella, situate in the barony of Longford and county of Galway, containing 88 acres or thereabouts, from the 1st of December, 1886, to the present time, or in the alternative, that the mesne rates payable by the defendants for wrongfully withholding possession of said lands during said period may be ascertained and the sum found due ordered to be paid by the defendants to the plaintiff; and to have it declared that the plaintiff is entitled to the possession of said lands, free from any claim or tenancy of the defendants, or, alternatively, is entitled to receive the rents and profits of said land from the defendants as future tenants thereof within the meaning of the Land Law (Ireland) Acts, and for such further or other relief as the Court shall deem meet."

The statement of claim was as follows:—

1. "The plaintiff is seized in fee of the lands of Gortnakella, in the barony of Longford and county Galway.

2. "In and prior to the month of October, 1886, part of the lands of Gortnakella, containing 88 acres statute measure or there-

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abouts, were held by John Abbott, as tenant to plaintiff, at the yearly rent of £142.

3. "In the year 1886 the plaintiff took proceedings for the recovery of said 88 acres (hereafter called the holding) for non-payment of rent, and obtained a judgment for possession thereof, and in said month of October, 1886, possession of the holding was taken under said judgment on the plaintiff's behalf by the defendant John Ryder.

4. "In or about the month of January, 1887, the plaintiff's then agent, Mr. Francis J. Joyce, gave defendants, or one of them, permission, in consideration of £15, to graze the holding until the time within which the said John Abbott could redeem should expire, which would be about the 1st of May, 1887, but it was well known that the said John Abbott did not intend to redeem, as he had peaceably given up possession of the holding, and was not willing to continue tenant. The defendant John Ryder was at the time in the plaintiff's agent's employment as stock-buyer, and the defendant Patrick J. Ryder was a clerk in the office of the plaintiff's agent.

5. "The said Francis J. Joyce ceased to be the plaintiff's agent in or about the month of February, 1887, and is since dead.

6. "The defendants entered into possession of the holding and put their cattle on it, but did not take off their cattle on the 1st of May, 1887, and are still in possession of the holding, which is of the annual value of about £142.

7. "The plaintiff has caused frequent applications to be made to defendants to give up the possession of the holding, but defendants refuse to give up possession, and assert that they are entitled to a present tenancy in the holding, and claim to fix a fair rent, but plaintiff has declined to recognise any such right, and asserts defendants are wrongfully in possession from the 1st of May, 1887, and defendants have neither paid any rent or given up possession of said lands. Both defendants have called on plaintiff's agent on several occasions and negotiated for arrangement of a rent of the holding to be fixed, but no agreement has been come to, as plaintiff's agent refused to treat defendants as tenants, and defendants retain possession against plaintiff's will.

"The plaintiff claims:—

(1.) "To have it declared that the defendants are not, nor is either of them entitled to any tenancy in the holding, and that the defendants be ordered to deliver up possession thereof to the plaintiff.

(2.) "To have it declared in the alternative that the defendants are not entitled to a present tenancy in the holding within the meaning of the Land Law (Ireland) Acts.

(3.) "To have an inquiry what sum is due to the plaintiff by the defendants for mesne rates of the holding while defendants have been wrongfully in possession thereof.

(4.) "To have an account of what is due by the defendants to the plaintiff for the use and occupation of the holding from the 1st of May, 1887, to the commencement of this action, and that the defendants be ordered to pay to the plaintiff the sum found due.

(5.) "Alternatively, if the Court be of opinion that the defendants are entitled to a tenancy in the holding, payment of the arrears of rent due by the defendants at the rate of £142 per annum from the 1st of May, 1887."

The defendants pleaded separately. By his defence John Ryder denied that he ever claimed any interest or tenancy in the said lands, and repudiated any such interest or tenancy. Patrick J. Ryder by his defence admitted the statement in the 1st, 2nd, 3rd, and 5th paragraphs of the statement of claim, and also admitted that he had entered into possession of the lands, and was still in possession of the same. The defendant denied, however, that the lands were of the value of £142. The rest of the defence was as follows:—

3. "The said defendant further says that he entered into possession of the said lands, as aforesaid, under an agreement with the plaintiff, whereby the plaintiff let to him the grazing of the said lands for £15 to the 1st of May, 1887, and whereby the plaintiff agreed to let the said lands to him as tenant from year to year from the 1st of May, 1887, at a yearly rent to be fixed by agreement between the plaintiff and the said defendant.

4. "At the time of agreement in the last paragraph hereof

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mentioned, it was of great importance to the plaintiff in the general interest of his estate, altogether irrespective of the value of the said lands that same should be let and not remain unoccupied.

5. "The said defendant has been always ready and willing to carry out the said agreement with the plaintiff, and on the faith of said agreement he so entered into and remained in possession of the said lands, and was for a long time permitted by the plaintiff without question to remain in possession of the said lands. The plaintiff, however, as stated in the seventh paragraph of the statement of claim, has refused to recognise any right of tenancy in the said defendant. The said defendant has never claimed to be a present tenant under the Land Law (Ireland) Acts, but he admits that he has negotiated with the plaintiff, with a view of having the rent of said lands fixed in pursuance of the said agreement. The plaintiff has refused to carry out said agreement.

6. "The said defendant submits that this action is wholly unnecessary, and should not have been instituted."

Issue was joined on these pleadings. Notice of trial was served, and the action came on for hearing, the witnesses of both parties being in attendance, and neither party having made any application to the Court to transfer the action to a Common Law Division.

*Twigg*, Q. C., *Stritch*, Q. C., and *Fetherstonhaugh*, for the plaintiff.

*O'Connor*, Q.C., and *H. G. Richards*, for the defendant Patrick J. Ryder.

THE VICE-CHANCELLOR :—

This appears to me to be an attempt to make what is in reality an ejectment on the title against an overholding tenant and a trespasser appear to be a suit for equitable relief. The case made by the statement of claim is that a letting for grazing, for a certain short period, was made by the plaintiff to the defendants or one of them of the lands in question under which they entered, and that they did not give up possession at the end of the term, but continued still in possession; that demands of possession were made, but that the defendants refuse to give up the lands, and that ap-

plications by the defendants to obtain a new letting were made by the defendants to the plaintiff, but that they were refused, as the plaintiff declined to recognise them as tenants, and that they still retain possession against the plaintiff's will. The defendant John Ryder by his defence alleges that he never was a tenant and never has claimed to be such, and he disclaims any tenancy in the lands. Against him therefore if this were an ejectment on the title, plaintiff could mark judgment for possession as a matter of course. The other, Patrick Ryder, sets up a case of a new letting to him, which is denied by the plaintiff, on grounds not necessary for me now to consider but which do not involve any question of equitable right.

The prayer of the claim has been ingeniously framed; and begins by asking for a declaration that the defendants are not entitled to any tenancy in the lands, and that they may be ordered to deliver up possession to the plaintiffs. This is in other words a prayer for the ordinary judgment in ejectment on the title, with an unnecessary declaration of right prefixed. It is clear that if there is no tenancy, the defendants' possession is wrongful, and an ejectment in common form would be the appropriate remedy.

The second alternative, by which the plaintiff seeks to have it declared that defendants are not entitled to a present tenancy in the holding within the meaning of the Land Law (Ireland) Acts, is one which I am at a loss to understand the necessity for, having regard to the preceding paragraph. The third clause is for an inquiry as to mesne rates which would follow as of course if the plaintiff is entitled to possession as against an overholding tenant or a trespasser. Nos. 4 and 5 are put forward as claims to alternative relief on the supposition that the defendants were tenants, one being for use and occupation generally, and the other for arrears of rent.

On the whole I am of opinion that this is a plan to avoid the ordinary procedure pointed out by the Judicature Act, and I feel bound to stop this action and to dismiss it with costs.

But I shall do so without prejudice to any proceeding which the plaintiff may be advised to take for recovery of the premises by ejectment, or for mesne rates, or to sue the defendants for rent, or for use and occupation.

T. H. M.

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Jan. 13.

The plaintiff appealed to the Court of Appeal (FitzGibbon, Barry, and Walker, L.JJ.).

*Twigg, Q.C.*, and *Stritch, Q.C.*, for the appellant :—

The plaintiff was entitled to bring this action in the Chancery Division. There is nothing to prevent an action for recovery of land being brought in the Chancery Division : *Hodgens* v. *Hickson* (1) ; *Magdalen Hospital* v. *Knotts* (2) ; *Holme* v. *Guy* (3) ; *Read* v. *Wotton* (4); *Hunt* v. *Worsfold* (5); *Fricker* v. *Van Grutten* (6). The 36th section of the Judicature Act (Ireland), 1877, prescribes that certain specified kinds of legal proceedings shall be brought in certain specified Divisions of the High Court. This section contains no reference to an action for recovery of land. The 37th section enacts that subject to any rules of Court—and none have been made limiting the right of a plaintiff to bring an action like the present in the Chancery Division—and subject to the provisions of the 36th section, every plaintiff may assign his action or cause to one of the Divisions of the High Court *as he may think fit.* Even if one of the actions specified in section 36 is brought in a Division to which the section has not assigned it, the only course open is to transfer it to the proper Division. There is no jurisdiction to do as the Vice-Chancellor did—to dismiss the action. They also cited *Black* v. *Diver* (7) and *Hilman* v. *Mayhew* (8).

*Meredith, Q.C.*, and *O'Connor, Q.C.* (with them *H. G. Richards*), for the respondent :—

No doubt the Vice-Chancellor had full jurisdiction to hear this case ; but he dismissed it, as being a thinly-veiled attempt to evade the Judicature Act. No application was made to the Vice-Chancellor to transfer the case to the Queen's Bench Division. There is no means to compel the Vice-Chancellor to hear the case, and this Court cannot make an order transferring the case to the Queen's Bench Division : *Pinney* v. *Hunt* (9) ; *Bradford* v.

(1) 12 I. L. T. R. 104.
(2) 5 Ch. D. 175; 8 Ch. D. 709; 4 App. Cas. 324.
(3) 5 Ch. D. 901.
(4) [1893] 2 Ch. 171.
(5) [1896] 2 Ch. 224.
(6) *Ibid.* 649.
(7) 1 L. R. Ir. 107.
(8) 1 Ex. D. 132.
(9) 6 Ch. D. 98.

*Young* (1); *Pollard's Case* (2). Rules of Court have been made relating to actions for recovery of land which are not applicable to proceedings in the Chancery Division, and which virtually have the effect of assigning such actions specifically to the Common Law Divisions. This Court has no power to transfer the action to the Queen's Bench Division: *In re Hutley* (3).

FITZ GIBBON, L.J.:—

This case is at present in a very embarrassing position, and both parties will necessarily be involved in considerable expense by what has occurred.

The action was brought to have an account taken of what was due by the defendants to the plaintiff for use and occupation of certain premises in the county Galway, during a period of nearly ten years, or, in the alternative, that the mesne rates payable by the defendants for wrongfully withholding the premises during that period might be ascertained, and the amount found due ordered to be paid by the defendants to the plaintiff, and to have a declaration that the plaintiff was entitled to possession of the premises free from any tenancy of the defendants, or, in the alternative, that he was entitled to receive the rents and profits of the premises from the defendants as future tenants thereof. This claim which appears on the writ of summons, is somewhat amplified in the prayer for relief appended to the statement of claim. The statement of claim contains allegations which, if true, would show the defendants to be trespassers, and it states no facts to ground the alternative declaration claimed in the writ of summons; on the contrary, it negatives any tenancy between the parties. The first paragraph of the prayer claims a declaration that the defendants are not, nor is either of them, entitled to any tenancy in the holding, and that the defendants be ordered to deliver up possession to the plaintiff. The second paragraph asks "to have it declared, in the alternative, that the defendants are not entitled to a present tenancy in the holding within the meaning of the Land Law (Ireland) Acts." The third and fourth paragraphs are merely alternative claims for an account of what is due by the

(1) 26 Ch. D. 656. (2) 20 Q. B. D. 656. (3) 1 Ch. D. 11.

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defendants to the plaintiff, either in use and occupation, or by way of mesne rates. The fifth paragraph claims "alternatively, if the Court be of opinion that the defendants are entitled to a tenancy in the holding, payment of the arrears of rent due by the defendants at the rate of £142 per year from May 1st, 1887." Liability to rent could only arise under some contract, and the existence of any contract is expressly negatived by the statements contained in the body of the claim.

Separate defences were put in by the defendants. John Ryder has pleaded, by way of disclaimer, that "he had never claimed, nor does he claim to be tenant in the lands," and that "he never claimed, nor does he now claim, any interest whatever in the said premises." The effect of such a defence, in an action of ejectment, would have been to enable the plaintiff to enter judgment for the possession only, leaving him free to proceed in a new action to recover any mesne rates to which he might be entitled.

The other defendant Patrick Ryder has delivered an elaborate defence in which he takes up the alternative presented by the plaintiff. He admits that he is in possession, and he claims to have entered into possession under an agreement whereby the plaintiff let to him the grazing of the lands for £15, to May 1st, 1887, and agreed to let the lands to him as tenant from year to year from May 1st, 1887, at a yearly rent to be thereafter fixed by agreement between the plaintiff and this defendant. The defence then alleges that "the defendant has been always ready and willing to carry out said agreement with the plaintiff, and, on the faith of said agreement, he so entered into and remained in possession of said lands, and was for a long time permitted by the plaintiff without question to remain in possession of the said lands. The plaintiff, however, as stated in the seventh paragraph of the statement of claim, has refused to recognise any right of tenancy in the said defendant. The said defendant has never claimed to be a present tenant under the Land Act, but he admits that he has negotiated with the plaintiff with a view of having the rent of the said lands fixed in pursuance of said agreement. The plaintiff has refused to carry out said agreement." In conclusion, the defendant Patrick Ryder submits "that the action was wholly unnecessary and should not have been instituted." This defence, in effect,

alleges that Patrick Ryder holds the lands under an agreement which the plaintiff ought to specifically perform, and that his non-performance of it is the only obstacle to his getting his rent. On the pleadings, therefore, the plaintiff has set forth an alternative claim for equitable relief, without stating any facts to support it, and the defendant declares his readiness to give that relief, but declares that the plaintiff has refused to do what is necessary to obtain it.

The case came on for trial in due course. The parties with their witnesses were in attendance. The case was opened before the Vice-Chancellor, and we are told by counsel that, without calling on the defendants, the learned Judge, having come to the conclusion that the case ought not to have been brought in the Chancery Division, dismissed the action with costs, without prejudice to any other proceedings which the plaintiff might take to recover possession of the lands by ejectment or for rent. That result of the action can be sustained only on the assumption that the cause of action was one of which another division had *exclusive* cognizance. With all respect, neither the provisions of the Judicature Act, nor the cases to which the respondent has referred us, warrant that conclusion. Under the Act, an action cannot be dismissed in one division, merely because it could have been better brought in another. If the first division *has jurisdiction* to give a decree, and if the objection to its being entertained rests only on propriety or convenience, it may be transferred, but it cannot be dismissed.

In *Bradford* v. *Young* (1) Pearson, J., was asked to recall probate of a will in an action brought in the Chancery Division in which the plaintiff sought, in the alternative, to obtain relief grounded on the will of which the probate had been granted. The learned Judge says :—"The first application made to me on the part of the plaintiff was that I should establish the domicil of the testator to have been Scotch, and that therefore the document in question was improperly proved as his will in the English Ecclesiastical Court, and that I should recall the probate. It was said that under the Judicature Acts the Chancery Division has

(1) 26 Ch D. 656.

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now (with one exception, I believe) all the powers which any of the other Divisions (including the Probate Division) have, and that, when any question of probate arises incidentally in the progress of any cause in this Division, this Court ought not now to send that question for discussion and decision to the Probate Division, to which it properly belongs, but ought to take upon itself to decide it. I do not intend to decide now that under no possible state of circumstances would the Chancery Division have the power either to grant or to recall probate of a will. I do not say that under the Judicature Acts it is impossible that the Chancery Division should exercise that power, but following what Sir George Jessel, M.R., said in *Pinney* v. *Hunt* (1), with which I entirely agree, I am certain that if I were now to assume any such jurisdiction, I should not be acting at all in the spirit of the Judicature Acts, but I should simply throw things into the greatest possible confusion by blending together jurisdictions which undoubtedly the Judicature Acts intended to the utmost possible extent to keep separate. I should be assuming functions which properly belong to another branch of the Court, and that for no good purpose. I decline to do this, and I refuse to enter into the question whether the probate ought or ought not to be recalled; I simply refuse that part of the relief asked without expressing any opinion whether the plaintiff is entitled to it, if he chooses to prosecute his claim in another branch of the High Court." He gave the alternative relief. He did not dismiss the action. He only refused to exercise the jurisdiction which peculiarly belonged to the Probate Division, by giving not merely inconsistent, but contradictory, relief.

In *Pollard's Case* (2) the Court of Appeal held that the Queen's Bench Division had jurisdiction to make the order sought, but were of opinion that the application was irregular, and, having regard to the well known practice of the Court, that the applicant's conduct was even blameworthy. However, notwithstanding these circumstances, they did not affirm the order of the Queen's Bench Division refusing the application, but directed that the matter should stand over to enable the applicant to apply for the necessary consent to have the matter transferred to the Chancery Division.

(1) 6 Ch. D. 98. (2) 20 Q. B. D. 656.

This case presents some similarity to *Pollard's Case* (1). It is not an action exclusively within the cognizance of the Common Law Division: *Pollard's Case* (1) was not exclusively within the cognizance of the Chancery Division; but each of the cases was laid in a Division before which matters of the kind are not usually brought.

When this action came on for trial, no application to have it transferred having been previously made, the learned Judge put no stay on the proceedings to enable the action to be transferred to another Division, nor did he *ex mero motu* take steps to have the action transferred, but he dismissed it with costs. I cannot think that he had jurisdiction to make such an order. Under the Judicature Act (section 38) he had power, subject to the Rules, either with or without the application of either party, to transfer the action to the Queen's Bench Division, or to retain and dispose of the action himself. The very essence of the change made by the Judicature Act is stated by Sir George Jessel, M.R., in *Hurst* v. *Hurst* (2), an action in the Chancery Division, in language which may be applied to this case. "The plaintiff's title both to the leaseholds and freeholds is a legal title, and we are in fact giving him possession and mesne profits. Before the Judicature Act no bill in equity could have been maintained for that purpose, not because the plaintiff had no right, but because a Court of Equity has no jurisdiction to enforce it any more than the Divorce Court had. But, before the cause came on to be heard, the Judicature Acts came into operation, transferring the jurisdiction of all the old Courts to the High Court, and enabling all the branches of the High Court to exercise that jurisdiction, with a provision as to pending suits."

Even had this action been one of which a Common Law Division had exclusive cognizance, the only power which the Judge ought to have exercised was that of transferring it to the proper Division under section 37, sub-section 2. But having jurisdiction to decide the case, he, *a fortiori*, could not dismiss it without judicially inquiring whether the plaintiff had a good cause of action on the merits.

(1) 20 Q. B. D. 656.
(2) 21 Ch. D. at p. 294.

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What are we to do now? If I were certain that we had jurisdiction I should prefer to hear the case ourselves, rather than send it back. However, no application to that effect has been made, and Mr. O'Connor contends that we have no power either to hear it ourselves or to transfer it to another Division, unless upon motion regularly made. It remains, therefore, as the only course open, that we should first discharge the order made by the Vice-Chancellor, and then remit the case to him to proceed therein as to justice may appertain. We make no observation limiting the jurisdiction of the Vice-Chancellor, either to hear the case himself or to transfer it to a Common Law Division, either on application of either party, or of his own motion. However, speaking for myself, I think that if the case is again allowed to reach the same stage as before, without any step having been taken to transfer it, that is to say, if the parties and their witnesses are present in Court ready for the trial, it will be then too late for the Judge to transfer the action, and justice must be done by him between the parties, at the time, and in the place, when and where they present themselves to ask for it.

This statement of claim was deliberately framed to bring the action before the Vice-Chancellor. The defence of Patrick Ryder was deliberately framed to meet the plaintiff's case on equitable grounds in the Chancery Division. Neither party took any step to have the action transferred to a Common Law Division. The retention of it in the Chancery Division was the act of both parties. We consider, therefore, that each party should suffer equally in bearing the loss that has been incurred. We accordingly direct that their costs of the day in the Court below and their costs of this appeal shall be borne by the parties respectively.

BARRY, L.J.:—

I concur. I think there is no course open to us to take whereby we can remedy or mitigate the evils that have already occurred. I cannot blame the plaintiff for the course he has taken. He had *prima facie* a legal right to bring this action in the Vice-Chancellor's Court. It is plain that his object was to avoid a trial by jury, which would have been inevitable if the action was to be

tried in a Common Law Division. At the same time I am very reluctant to give any encouragement to any departure from the usual practice, and can fully sympathise with the Vice-Chancellor's disinclination to having the ordinary proceedings of his well-regulated Court disturbed to suit the interest or caprice of a plaintiff. However, the defendant Patrick Ryder did not, as he might have done, move to transfer the action to a Common Law Division; on the contrary, he, as far as in him lay, adopted the tribunal chosen by the plaintiff. No application has been made to us to transfer the action to a Common Law Division; but, on the contrary, the defendant's counsel has even referred us to a case to show that we have not jurisdiction so to do. Under these circumstances I agree that the only order we can make is to send the case back to the Vice-Chancellor to proceed therein in due course of law.

WALKER, L.J. :—

The action to recover possession of land is not exclusively reserved to the Common Law Divisions by the Judicature Act. It cannot be contended therefore that the Vice-Chancellor had not jurisdiction to hear this case. At every stage of the case both parties have adopted the Vice-Chancellor's Court as the *forum* in which the action should be tried. Accordingly, I think, we cannot affirm the order of the learned Judge by which he dismissed the action with costs when it came on for trial before him, both parties attending with their witnesses. There was nothing to throw on either party the duty of applying to have the action transferred to a Common Law Division. On the other hand, the Judge had power, *mero motu*, to take the necessary steps to have the action transferred; but he did not take this course.

Mr. O'Connor has pointed out some good reasons why an ejectment would not be well tried in the Chancery Division, and I agree with him; but I do not think there is anything to show that the Vice-Chancellor had not jurisdiction to try such a case.

I say nothing as to the exercise of the discretion of the Judge in transferring the action to a Common Law Division, or in retaining it in his own Court. That may be safely left to him to exercise. But if the case should again reach the stage of coming

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on before the Judge for trial with the parties and witnesses in attendance, I think it would be then too late for the Judge himself to take steps to change the *forum*.

Solicitor for the plaintiff: *C. S. Graham.*

Solicitor for the defendant P. J. Ryder: *R. F. Barry.*

G. Y. D.

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*V.-C.* 1896. July 23, 31.

*Appeal.* 1897. June 10, 11.

## MARTIN *v.* MARTIN.

(1895. No. 871.)

*Tenant for life and remainderman—Resumption by tenant for life of tenant's holding on settled lands—Land Law (Ireland) Act*, 1881, *section* 21—*Payment of compensation by tenant for life—Merger of tenancy—Equity against inheritance for compensation paid—Constructive trust—Waste—Cutting timber—Registered timber.*

A landlord, who was tenant for life of settled lands, served an originating notice, seeking to resume possession of a holding under sect. 21 of the Land Law (Ireland) Act, 1881, for the purpose of occupying the same as a residence for herself and family. The sum of £600 was ascertained by the Land Commission as the amount of compensation to be paid by the landlord to the tenant for such resumption: the landlord paid this sum to the tenant and went into possession of the holding, upon which there was timber registered by the tenant. The remainderman subsequently brought an action against the tenant for life, seeking to restrain her from committing waste, cutting timber, &c., on the settled lands. In this action the tenant for life denied committing the waste, and by counterclaim sought to have the sum of £600 so paid by her declared well charged on the inheritance of the lands of which she had resumed possession. On the evidence adduced on behalf of the plaintiff, the Vice-Chancellor was satisfied that no waste had been committed, and refused the injunction asked for in the original action. On the counterclaim the Vice-Chancellor held that, on the resumption of the holding, the defendant did not become entitled thereto for her own exclusive benefit, but that a constructive trust arose in respect thereof in favour of the plaintiff, to the benefit of which he was entitled upon the terms of repaying such proportion of the compensation as his estate in remainder should fairly bear, and accordingly that the plaintiff was put to his election either to insist on having the benefit of the resumption of the holding on paying his contribution to it, or to repudiate it altogether. Thereupon the plaintiff repudiated the resumption of the holding, and the Vice-Chancellor, being of opinion that under such circumstances, in

equity, no merger of the tenant's interest in the reversion took place, held that the defendant was entitled to take for her own benefit the interest of the tenant in the holding so resumed, with all rights thereto attaching :—

*Held* by the Court of Appeal (varying the order of the Vice-Chancellor) that the resumption having been carried out under the provisions of sect. 21 of the Land Law (Ireland) Act, 1881, without any contract between the tenant for life and the remainderman regulating their respective rights, the tenant for life was not entitled to any such equity as that declared by the Vice-Chancellor, or to any charge for the amount of the compensation or any part thereof upon the inheritance.

TRIAL OF ACTION.

The facts are fully stated in the judgment of the Vice-Chancellor.

*Kehoe, Q.C.*, and *E. A. Ennis*, for the plaintiff.

*Wright, Q.C.*, *Matheson, Q.C.*, and *C. Doyle*, for the defendant.

THE VICE-CHANCELLOR :— July 31.

This action has been brought by the plaintiff, the eldest son and heir-at-law of Andrew Martin, against his mother, the widow of Andrew Martin, for an injunction to restrain her from committing waste on the lands of Eagle Hill, of which she is tenant for life under the will of her late husband ; as the will made no further disposition of his real estate, it descended to the plaintiff as heir-at-law.

The plaintiff alleges that the defendant committed several acts of waste in breaking up ancient pasture, pulling down stone fences and selling the stones : and, as his principal ground of action, the cutting for sale of timber trees growing on the lands. The only waste of which there was any evidence, was the cutting of some trees, the plaintiff having failed to prove that the defendant had committed any of the other waste alleged, and the evidence on the part of the defendant having satisfied me that none such had been committed by her. It appeared that the defendant, believing that she had a right to certain registered timber on the lands, did, in the year 1895, agree to sell the same to a dealer in timber, who proceeded to cut the same, but that no serious injury had been done, as the defendant, after two trees only had been cut, put a

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stop to the cutting, on the plaintiff objecting to it, since which no further cutting took place.

The defendant, by her defence, claims the right to cut the timber, and she also, by counter-claim, claims to have a charge for £600 on the lands, as the price paid by her for the exercise of her right as landlord to resume possession under the Land Law Acts, under the following circumstances.

The lands were held by a tenant named Clarke under a lease for three lives, of which he was the assignee. The last life died in the year 1884, and thereupon Clarke became a present tenant, and had a right, under the Land Law (Ireland) Act, 1881, section 21, to have a fair rent judicially fixed upon his holding, subject to the conditions in that section provided. One of these is, that if the landlord desires to resume the holding for any of the purposes therein mentioned, including the purpose of occupying same as a residence for himself, or as a home farm in connection with his residence, or for the purpose of providing a residence for some member of his family, the Court may authorise him to resume the same accordingly in the manner and on the terms provided by the 5th section of the Act.

Shortly after the termination of the lease the defendant, as landlord, served an originating notice of application to the Court for authority to resume the holding for the purpose of occupying the same as a residence for herself and her family.

Thereupon Clarke, the tenant, served an originating notice of an application to the Court to fix a fair rent, with a schedule of improvements, for which he claimed compensation amounting to £937, amongst which was an item of £150 as the present value of timber planted by his predecessor in shelter groves and boundaries. This timber had been duly registered by the tenant under the Registration of Timber Acts, and could have been cut and sold by him unless purchased by the landlord under those Acts. By an order of a Sub-Commission Court the Sub-Commissioners authorized the landlord to resume the holding on the terms that the landlord should pay to the tenant, by way of compensation, the sum of £600, the tenant paying all rent due to the landlord up to the 1st November, 1885. There was a considerable amount of rent due, which belonged to the defendant, as tenant for life, and for which

she allowed the tenant credit out of the £600, and she paid the balance in cash. The full sum of £600 was thus paid by the defendant, and she thereupon resumed possession of the holding, and has continued in possession since.

The first question is, whether she thereupon became the owner of the registered timber? The value of this was not separately ascertained by the order for resumption, but it is plain that whatever the Commissioners may have allowed for it, it was included in the £600, and passed with the holding to the landlord.

The defendant claims to have been thus constituted the present owner of the timber and entitled to cut it, as the tenant would have been if his tenancy had not been determined. The tenant's right of cutting would have been subject to the requirements of the Timber Acts, but, as the right to cut was vested by the resumption in the landlord, these requirements ceased to be applicable.

On resumption of the holding all the interest of the tenant in the lands determined, and the tenancy as between landlord and tenant ceased to exist. But thereupon another question arises, namely, whether, on the established principle of this Court as to graft, the tenancy was determined as between tenant for life and remainderman. According to the doctrine of constructive trusts, a purchase by a tenant for life, or other person having but a limited interest, of some further estate or beneficial interest in the settled property is deemed to have been so purchased for the benefit of all persons beneficially interested. The purchase in the present case was of an interest that would, but for such purchase, have been enjoyed by the tenant, and which might be of benefit to all persons who should from time to time, during its continuance, be owners of the settled property. I am of opinion that such constructive trust arose upon the purchase of the tenant's interest by the defendant, and that she could not claim to hold this purchase for her own exclusive benefit. She does not claim to do so, but offers the benefit of it to the plaintiff, if he chooses to have it on equitable terms. These terms are that he should repay to the defendant the sum paid by her for the purchase, or at least the proportion of it which his estate in remainder should fairly bear.

In the analogous case of the renewal of a lease obtained by a tenant for life, the expense of obtaining such renewal must be

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borne by the parties respectively in proportion to the benefits derived by them respectively from the renewal. The same principle applies to this case; it is not necessary for me to lay down any rule in the present case for the ascertainment of these respective proportions, as the plaintiff has refused by his counsel at the bar to avail himself of the defendant's purchase. I am of opinion that he is put to his election whether to insist upon having the benefit of the purchase, on paying his contribution to it, or to repudiate it altogether. He elects to repudiate it.

What then are the defendant's rights? She is, in my opinion, relieved from the constructive trust. I do not think that she can claim against the will of the plaintiff to have a charge on his reversion for what she paid, or for his contribution to it; but on the other hand he cannot be permitted to take the benefit of the purchase without contributing to it. The question then is how this equity of the defendant is to be worked out? The only mode of doing so appears to me to be to deem the tenancy to be still subsisting in equity for her benefit, and to declare her entitled in equity to all rights as against the inheritance which Clarke would continue to have if the resumption had not been effected, including his rights under the Timber Acts, to cut the registered timber. Under such circumstances there would be no merger in equity of the tenant's interest in the reversion. The defendant would then in equity as between her and the plaintiff be entitled to all the benefits of the statutory tenancy that Clarke would have had upon his originating notice.

I do not find anything in the Land Law Acts to prevent effect being given to this equity.

I am of opinion that the plaintiff has failed to make a case for the injunction. I consider the action vexatious and unfounded, and I dismiss it with costs.

I shall make a decree for the defendant on her counterclaim, but as the plaintiff has elected not to take with the purchase of the tenant's interest I cannot make a decree in the terms of her prayer, but I shall declare that the plaintiff having elected to take against the resumption by the defendant of the interest of Clarke, the late tenant of the lands, and refusing to take with the same, the defendant is entitled to take for her own exclusive benefit the

interest of the said tenant in the holding so resumed by her, with all rights thereto attaching, and that accordingly the said interest of the tenant shall for the benefit of the defendant be deemed a subsisting interest in equity, notwithstanding such resumption.

The parties must bear their own costs respectively of the counterclaim.

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T. H. M.

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The plaintiff appealed to the Court of Appeal (Lord Ashbourne, C., and Fitz Gibbon, and Walker, L.JJ.)

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June 10, 11.

*Kehoe, Q.C.*, and *Henry*, for the appellant :—

The power to resume a holding for the purposes of a residence is a personal privilege conferred by section 21 on the landlord for the time being : there is no power to create a charge for the amount of the compensation which will affect the inheritance. It is analogous to the case of compensation for improvements : apart from the provisions of the statute (33 & 34 Vict. c. 46, ss. 26, 27) a limited owner has no power to recoup himself for a payment made in respect of improvements by a charge on the inheritance : Butt's Compensation, etc., p. 363 : a tenant for life who expends money in increasing the value of the inheritance does not thereby acquire any right to a charge upon the inheritance for any portion of such outlay : *Gilliland* v. *Crawford* (1) ; *Nairn* v. *Majoribanks* (2) ; *Caldecott* v. *Brown* (3). If the holding is relet after resumption within fifteen years it becomes subject to a present tenancy. Is the landlord for the time being then to become subject both to the charge and the present tenancy ?

[They also argued that the plaintiff was entitled to an injunction to restrain the acts of waste complained of ; but the Court of Appeal at the conclusion of the argument for the plaintiff intimated to the counsel for the respondent that they should confine their argument to the matter of the counterclaim.]

*Matheson, Q.C.*, and *C. Doyle*, for the respondent :—

The resumption of a holding under section 21 is to be carried

(1) Ir. R. 4 Eq. 35. (2) 3 Russ. 582. (3) 2 Hare, 144.

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out in the manner and on the terms provided by sect. 5, that is, by a sale to the landlord. The position of a limited owner buying up a tenancy on the estate is similar to that of a limited owner buying up an incumbrance. In equity it requires no act of the limited owner to keep the tenancy or incumbrance so bought up alive. There is nothing in the Land Acts to deprive the landlord of this equity. No doubt there is a constructive trust in favour of the remainderman if he elects to adopt the transaction, but if he repudiates it there is no alternative but the decree of the Vice-Chancellor.

June 11.

LORD ASHBOURNE, C. :—

This action was brought by a son against his mother, claiming an injunction to restrain the defendant from committing waste upon the lands of Eagle Hill, which she holds as tenant for life, and to which the plaintiff is entitled in expectancy, subject to her life estate. The defendant, by way of counterclaim, seeks to have the sum of £600 declared to be well charged upon the inheritance of the lands, this sum having been paid by her as landlord as compensation to a former tenant of the land, possession of whose holding she resumed under the provisions of the Land Law (Ireland) Act, 1881. Upon the facts proved in evidence before him, the Vice-Chancellor held that the plaintiff had failed to make out a case for the injunction, and he accordingly dismissed the action with costs. But on the counterclaim the learned Judge came to the conclusion that the defendant was entitled to relief: and on the plaintiff's refusal to admit that the sum of £600 was well charged upon the inheritance of the lands in favour of the defendant, he declared that the defendant was entitled to take for her own exclusive benefit the interest of the tenant in the holding resumed by her, with all rights thereunto attaching. At the conclusion of the argument for the appellant we intimated to counsel for the respondent, that we should not disturb the portion of the Vice-Chancellor's judgment which disposed of the original action, and we requested them to confine their argument to that portion which dealt with the counterclaim.

Clarke, the tenant, possession of whose holding was resumed, held the lands as assignee of a lease for lives, the last life in which

dropped in the year 1884. Shortly afterwards the defendant served an originating notice, seeking to resume possession of the holding as a residence for herself and family. The sum of £600 was duly ascertained by the Land Commission as the amount of compensation payable by the landlord to the tenant, and the same was paid by the defendant, who thereupon entered into possession of the lands. This sum of £600 is the sum which the defendant seeks to have declared to be a charge upon the inheritance.

The statutory provisions under which the defendant resumed possession are those of section 21 of the Act of 1881:—"Provided also that where it shall appear to the satisfaction of the Court that the landlord desires to resume the holding for the *bona fide* purpose of occupying the same as a residence for himself, or as a home farm in connection with his residence, or for the purpose of providing a residence for some member of his family, the Court may authorise him to resume the same accordingly, in the manner and on the terms provided by the 5th section of this Act with respect to the resumption of a holding by a landlord: Provided always, that if the holding so resumed shall be at any time within fifteen years after such resumption relet to a tenant, the same shall be subject, from and after the time of its being so relet, to all the provisions of this Act which are applicable to present tenancies." There is nothing in this case on which we can rest our decision except the naked fact that the landlord has availed herself of this power of resumption. No words of the section which I have read give power to a landlord who is a limited owner to fix a charge upon the inheritance in respect of the compensation which he may have to pay as the price for resuming possession. On the contrary, every word which I have read seems to treat the power as a privilege given to the landlord personally, a power which he may exercise at his own desire, without regard to his successor in title. The section requires the Court, before it authorises resumption, to be satisfied that the landlord *desires* to resume the holding for the *bona fide* purpose *of occupying the same as a residence for himself*—nothing can be more personal than that—or as a home farm in connection with his residence—again intensely personal—or for the purpose of providing a residence for some member of his family—it might be some favourite son or daughter. Everything

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points to the power as being a privilege conferred on the landlord for the time being, and there is nothing to indicate that the price he has to pay for exercising this personal right is to be a charge affecting the interests of those who take the inheritance after him.

The resumption, when authorised, is to be carried out "in the manner and on the terms provided by the fifth section"; and accordingly Mr. Matheson has pressed us with the provisions of that section, calling attention to the fact that in cases where resumption is authorised under these provisions, the proceedings are carried out by a sale from the tenant to the landlord. However, the frame and scope of the clause in section 5 authorising resumption are totally different from the provisions of section 21 authorising resumption for residence. "During the continuance of a statutory term in a tenancy, save as hereinafter provided, the Court may, on the application of the landlord, and upon being satisfied that he is desirous of resuming the holding or part thereof for some reasonable and sufficient purpose, having relation to the good of the holding or of the estate, including the use of the ground as building ground, or for the benefit of the labourers in respect of cottages, gardens, or allotments, or for the purposes of making grants or leases of sites for churches or other places of religious worship, schools, dispensaries, or clergymen's or schoolmasters' residences, authorise the resumption thereof by the landlord upon such conditions as the Court may think fit, and require the tenant to sell his tenancy in the whole or such part to the landlord upon such terms as may be approved of by the Court, including full compensation to the tenant." It is only necessary to read these words to see that totally different considerations arise where a holding is being resumed for any of the purposes here specified, none of which are purely personal to the landlord for the time being, and all of which have reference to the improvement of the inheritance, or are of public utility. Where the sale of a holding by the tenant to the landlord is carried out for any of these purposes, I can well conceive great weight being given to arguments which, in order to recompense a limited owner for his outlay, would seek to attach upon the inheritance liabilities imposed under equitable doctrines. But these considerations do

not affect a case of resumption of a holding for the purposes of residence. It is hard to see why, apart from special contract, the exercise by the landlord of a personal privilege conferred upon him by the statute should be made the foundation of an equity in his favour as against the remainderman. There is certainly nothing in the section which I have read which gives support to the claim put forward by the defendant.

We are accordingly of opinion that the decision of the learned Vice-Chancellor on the point raised by the counterclaim cannot be sustained, and must be reversed. But, in conclusion, I desire to point out that I decide this case on the simple fact that the landlord has exercised the power given her by section 21 of the Act of 1881, and that the sum which she seeks to charge is the sum paid as compensation under that section to the tenant, and that the resumption was carried out and the payment made without any arrangement having been made in respect thereof between the tenant for life and the remainderman.

I do not decide anything regarding the rights which the parties might have had had they been brought into privity with one another by contract. The decision of the Vice-Chancellor must be varied accordingly.

FITZ GIBBON, L. J.:—

I concur. As to the claim for waste, some distinction appears to have been made in the pleadings, and before the Vice-Chancellor, between the cutting of trees which had been registered by the tenant, and timber which originally and undoubtedly belonged to the reversioner. Though we do not disturb the order of the Vice-Chancellor upon this part of the case, I believe we all agree that we must preface our order with a statement that the defendant undertakes not to cut down any timber, even though registered by the tenant, as it would be waste to cut such timber without giving the previous notice, and affording to the remainderman the opportunity of purchasing the timber, contemplated by the Registry Acts, and, in the present case, it is very hard to see how effect could now be given at all to the suggested distinction between registered and unregistered trees.

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As to the counterclaim, I cannot reconcile any construction of the Act of 1881, section 21, enabling the landlord to resume a holding for a residence, with any power of directly or indirectly charging the inheritance, as the Vice-Chancellor has done, with the compensation payable to the tenant. The section provides that the resumed holding may be relet at any time within fifteen years after the resumption, and if so relet, it becomes at once subject to all the provisions applicable to present tenancies. In that case, what is to become of the charge in respect of the compensation paid for the resumption? Is the remainderman, on coming into possession, to find created against him, not only a present tenancy, but also a charge for the compensation paid by his predecessor? It was open to the tenant for life either to make some agreement with the remainderman before resuming, or possibly to deal with the tenant on some special terms which would preserve the tenancy as against the remainderman. But no such arrangement was made, and in this case the tenant for life has only such rights as are conferred by the statute. If she had died in 1891, without having dealt in any way with the resumed tenancy, Mr. Matheson was driven to contend that her personal representative could have levied the amount of the compensation as a charge out of her son's property. There is no warrant for such a contention. If she had resumed the holding as a residence, either for herself alone or for, say, a second son or a married daughter, for whose benefit would the charge enure upon her death?

The Vice-Chancellor seems to have treated the tenant's interest which was resumed as a kind of graft upon the inheritance, which could be severed, and set up again on its own account, if the inheritor declined to pay for it. It is impossible to work out such a graft. Who is to be the tenant, and when and how is the fair rent, or the power of fixing a fair rent, to be got at?

We say nothing as to cases of resumption under section 5, where other considerations might arise, and the acquisition of a definite benefit for "the good of the estate" might come in. Confining ourselves to section 21, we hold that the power of resumption given to the landlord for the purposes of a residence is optional, and personal, and that its exercise does not

enable him to burden the inheritance with any charge, or with any equity or graft.

The costs of the counterclaim must follow the result. We give no costs of the appeal.

WALKER, L.J., concurred.

Solicitor for the plaintiff: *Philip S. Smith.*
Solicitor for the defendant: *Anthony Nolan.*

G. Y. D

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## HAMILTON *v.* TIGHE.

*M. R.* 1897.

(1897. No. 855.)

Dec. 15.

*Practice—Costs—Proceeding by tenant for life and trustees for protection of settled estate—Salvage—Costs of action made a charge on the inheritance —Form of judgment.*

An action was brought by the tenant for life and the trustees of a settled estate to establish their right to a several fishery which formed part of the settled estate, and a decree was made, and a perpetual injunction granted with costs. The plaintiffs being unable to recover the costs from the defendants, who were paupers, instituted a separate action to have the costs made a charge on the inheritance, on the ground that the original action had been brought for the preservation of the fishery, and was in the nature of a salvage suit, and made defendants the next tenant for life, and the first tenant in tail in remainder. The defendants filed no defence and gave a consent for judgment:—

*Held*, that the Court had jurisdiction to make the costs a charge on the inheritance, and that it was a proper case in which to exercise the jurisdiction.

MOTION FOR JUDGMENT.

This action was brought by the plaintiffs, Charles Robert Hamilton and Edward Kendrick Bunbury Tighe, against the defendants, James Stuart Tighe and William Stuart Tighe, for a declaration that the costs of an action brought by the said Charles Robert Hamilton and Edward K. B. Tighe against John Sinnott and others to establish the right of the said plaintiffs to a several fishery in the River Nore, should be charged upon the said several

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fishery and upon the Woodstock estates in the said county, so that the same might become a charge upon the inheritance. This action, which is reported under the name of *Tighe* v. *Sinnott* (1), was brought by the trustees and the tenant for life of the Tighe estates, which consisted of the said several fishery and of the Woodstock estates in the county of Kilkenny, against certain fishermen, who had been in the habit of cot-fishing in the River Nore, within the limits of the said several fishery. A great deal of documentary and oral evidence was given, and several old witnesses were examined; and the plaintiffs alleged that if there had been further delay in instituting the action, the difficulty of establishing the plaintiffs' title would have been almost insuperable, and great risk would have been incurred of the fishery, which was a valuable portion of the Tighe estates, being wholly lost, and the plaintiffs submitted that the action was in the nature of a salvage suit. The Master of the Rolls gave judgment in that action in favour of the plaintiffs, and ordered the defendants to pay the costs, which he directed to be taxed on the higher scale. The defendants in *Tighe* v. *Synnott* (1) were all paupers, and unable to pay the costs, which amounted to £1740 10*s.* when taxed. The fishery and estates were, in the events which happened, limited to the said E. K. B. Tighe for life, with remainder to his first and other sons in tail male; and in default of such issue to the defendant, James Stuart Tighe, for life, with remainder to his first and other sons in tail male. The said E. K. B. Tighe was married in 1894, and there was one child of the marriage, a daughter. The defendant, William Stuart Tighe, was the eldest son of the defendant, James Stuart Tighe.

By the decree in *Tighe* v. *Sinnott* (1), the said estates had been increased in value by the sum of £300 a-year, the profit derived from the said fishery, and the title to it had been definitely established for the benefit of the inheritance.

The defendants put in no statement of defence, and signed a consent for judgment. The action came before the Master of the Rolls on motion for judgment.

(1) [1897] 1 Ir. R. 140.

*The Right Hon. C. H. Hemphill, Q.C.*, and *F. P. Hamilton*, for the plaintiffs:—

The Court has power, under its general jurisdiction, to sanction the payment by trustees of costs properly incurred by the tenant for life for the protection of the estate, whether as plaintiff or as defendant, or in particular proceedings: *In re Earl de la Warr's Estates* (1); *In re Lord Rivers' Estate* (2); *In re Ormrod's Settled Estate* (3); Seton on Decrees, vol. ii., p. 1481. The proceedings in *Tighe* v. *Sinnott* (4) were absolutely necessary for the preservation of the fishery, which is part of the settled estates, and the costs so incurred are in the nature of salvage expenditure: *Ferguson* v. *Ferguson* (5).

The defendants appeared at the hearing by solicitor only, and consented to the proposed decree.

THE MASTER OF THE ROLLS:—

Caution must be used in applying the principle relied on by Mr. Hemphill, and in deciding this case I am not to be taken as laying down any general rule that the costs of an action brought by a tenant for life for the purpose of protecting or enhancing the value of a settled estate come within the principle of the cases cited. In the present case it was absolutely necessary for the protection of the Tighe estate that the action of *Tighe* v. *Sinnott* (4) should have been brought. It was a case which lasted five days, including the day on which I delivered judgment. The principal plaintiff in that action was the tenant for life; the trustees of the settled estate were also joined as co-plaintiffs, but no application was made by them to the Court for liberty to institute the proceedings, or to have the costs of such proceedings charged upon the estate. In the result, however, if the action had not been brought, or had not been successful, this valuable fishery would have been lost to the estate. If an application had been made to me at the time to charge the costs

(1) 16 Ch. D. 587.
(2) *Ibid.* 588 note.
(3) [1892] 2 Ch. 318.
(4) [1897] 1 Ir. R. 140.
(5) 17 L. R. Ir. 552.

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on the estate I would have granted it. No objection to the order now asked for is made by the defendants, who represent the inheritance. So far from objecting, the remaindermen who are represented here, have actually consented.

Therefore, on the ground of pure salvage, which principle was extended afterwards to cases of protecting the settled estate, I have jurisdiction to declare the costs of the action of *Tighe* v. *Sinnott* (1) a charge on the inheritance. It is not stated whether these costs have been paid. I shall make the costs a charge on the inheritance from the date of the decree in *Tighe* v. *Sinnott* (1). The parties are entitled to their costs of this action, the amount of which when taxed is to be added to the charge.

The decree was as follows :—

"THIS COURT doth declare the sum of £1740 10*s.*, being the plaintiffs' taxed costs under the said judgment in the action of *Tighe* v. *Sinnott*, together with interest on the said sum, at the rate of four per cent. per annum from the date of the taxation of the same, and also the plaintiffs' costs of this action when taxed and ascertained, with interest thereon from the date of taxation at the rate aforesaid, well charged in their proper priority upon the fee-simple and inheritance of the several fishery, and also upon the Woodstock estates in the pleadings mentioned and set out in the schedule hereto annexed, and the Court doth declare that the said plaintiffs may be at liberty to raise the said moneys hereby declared well charged on the said fee-simple and inheritance by way of mortgage of the said premises or otherwise. And this Court doth further declare the plaintiffs entitled to their costs of this action when taxed and ascertained, the same to be charged as aforesaid. And it is ordered that the plaintiffs do pay to the defendants' solicitors the sum of £1 1*s.* as and for their costs of attending on this hearing, and have the same over with their own costs.

Solicitor for the plaintiff: *Lewis J. Watters.*

W. L.

(1) [1897] 1 Ir. R. 140.

## WARREN *v.* CLANCY (1).

*Appeal.*
1898.
Jan. 12, 17.

*Charitable bequest—Discretion of trustees—New trustees appointed by Court—Control of Court over fund—Jurisdiction to settle scheme—Payment out of Court.*

C. by will left all the residue of his property to the Right Rev. Dr. F., or the person for the time being Roman Catholic Bishop of Ferns, the Rev. T. S., Parish Priest of C., or the person for the time Parish Priest of C., the Rev. M. W. and N. H., upon trust for his daughter for life, and after her death to apply the trust estates for such charitable objects and purposes as his said trustees or trustee should in their or his absolute discretion think proper. The testator gave to his trustees powers of investment and of appointing new trustees, with a declaration that the latter power should be vested in the trustees or trustee for the time being, or by the executors or administrator of the last deceased trustee, subject to this direction, that so far as practicable the Roman Catholic Bishop of F. and the Parish Priest of C. should at all times be trustees of his will, if willing to accept such office. The testator appointed his trustees executors. He died in 1870, and the present action to administer his real and personal estate was commenced by the trustees in 1870. The testator's daughter died in 1897. All the trustees named in the will were then dead, and by orders of the Court the Roman Catholic Bishop of Ferns, the Parish Priest of C., and two other Roman Catholic clergymen were appointed new trustees of the will. They applied for payment to them of funds brought in to the credit of the action representing the testator's estate, and the application was supported by an affidavit stating the purposes to which they intended to apply the money, namely, for the support of Roman Catholic charitable objects in the diocese of F. and in the parish of C., where the testator lived. The Court being of opinion that, upon the construction of the testator's will, the original trustees had an absolute discretion as to the charitable objects and purposes to which the property was to be applied, and that a similar discretionary power was vested in the new trustees; *held*, that while the Court possessed in such cases jurisdiction to settle a scheme, it would not in a case like the present, where intervention was unnecessary for the protection of the property, interfere with the discretionary power of the trustees, and that accordingly the funds should be paid to them.

The decision of the Vice-Chancellor affirmed.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON and HOLMES, L. JJ.

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WARREN v. CLANCY.

BY his will dated the 2nd May, 1868, William Clancy devised and bequeathed all his real and personal estate to "The Right Rev. Dr. Thomas Furlong of St. Peter's College, Wexford, or the person who for the time being shall be or shall be officiating as or shall have episcopal superintendence as Roman Catholic bishop over the the Roman Catholics in the district known as the Diocese of Ferns; the Rev. Thomas Stafford of Castlebridge, in the county of Wexford, parish priest, or the person who for the time being shall be or shall be officiating as or shall have pastoral superintendence as the Roman Catholic parish priest over the Roman Catholics in the parish of Castlebridge aforesaid; the Rev. Michael Warren of Enniscorthy, in said county, and Mr. Nicholas Harpur of Ballymurrin, in the county of Wexford, farmer," upon trust, after payment of his debts for the use of his only child Catherine for her life, and after her death "to apply all said trust estates in and for such charitable objects and purposes as my said trustees or trustee shall in their or his discretion think proper."

The testator then gave a power of sale and investment to his trustees, and a power of appointing new trustees in the following terms:—"I declare that the power of appointing new trustees from time to time of this my will shall be vested in and exercisable by the trustees or trustee for the time being, or by the executors or administrators of the last deceased trustee, subject to the direction following, that is to say, that so far as practicable the Roman Catholic bishop exercising such superintendence as aforesaid, and the Roman Catholic parish priest of the parish of Castlebridge shall at all times hereafter be trustees of this my will if willing to accept the office, and I appoint my said trustees the executors of this my will."

The testator died on the 21st June, 1870, and probate was granted to the Rev. Michael Warren and Nicholas Harpur; the rights of the other executors being reserved. The suit was instituted in 1870 by the Rev. M. Warren and Nicholas Harpur against Catherine Clancy to administer the assets, on the 6th June, 1871, the primary decree was pronounced, and on the 31st May, 1872, the decree on further consideration was made. Catherine Clancy became of unsound mind, and proceedings in lunacy were instituted, in which she was declared to be of unsound

mind, and she so continued until her death on the 22nd March, 1897.

The Right Rev. Thomas Furlong died in 1875, and was succeeded as Bishop of Ferns by the Rev. Michael Warren. The latter died in 1884, and the Rev. Thomas Stafford and Nicholas Harpur, the two other trustees of the will, were also dead.

By order dated the 11th June, 1897, the Right Rev. James Browne, the Roman Catholic Bishop of Ferns, and the Rev. Sylvester Cloney, the parish priest of Castlebridge, were appointed trustees of the will, and by a further order dated the 12th July, 1897, it was ordered that the proceedings should be continued in their names as plaintiffs against the Attorney-General as defendant. By a further order dated the 9th November, 1897, the Rev. Nicholas Sheridan and the Rev. William Codd were appointed trustees of the will, so as to bring the number up to four. The property consisted of £9890 Consols, and cash in Court, some house property at Castlebridge, in the county of Wexford, and a small farm of land. The new trustees applied to the Vice-Chancellor to pay out the money to them, and in support of the application they filed an affidavit in which they stated the purposes for which they intended to apply the money :—(1). To invest in trustee securities a sum of £3000, and dispose of the annual income as follows—(*a*), about £20 a-year to be spent in providing food and clothes for the poor persons residing in Castlebridge parish ; (*b*), about £40 a-year to be devoted to keeping in repair the four schools and three Roman Catholic churches in Castlebridge parish ; (*c*), to devote the residue of the income annually to the clothing of poor children attending the schools of the parish of Castlebridge.

(2). To expend £3000 in the repair and improvement of the said four schools and three churches.

(3). To invest the residue of the funds in trustee securities, and apply the income to (*a*), the support of unbeneficed priests of the Diocese of Ferns, who through accident or illness are unable to do duty ; (*b*), the education of poor students for the priesthood to act as priests in the diocese of Ferns.

On the 29th November, 1897, the Vice-Chancellor made an order transferring the stock and cash to the four new trustees, and from that order the Attorney-General appealed.

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*E. Morphy*, in support of the appeal :—

The persons who had the power to administer the trusts in the first instance were the trustees named in the will; but they died without doing so, and now the Court must settle a scheme. Where trustees have power to dispose of a fund according to their discretion, the Court will not interfere except in the case of a charity, and then it will do so: *Gower* v. *Mainwaring* (1); *Moggridge* v. *Thackwell* (2).

The new trustees cannot determine the purposes to which the trust funds should be applied: *Hibbard* v. *Lamb* (3); *Morice* v. *Bishop of Durham* (4); *Stewart* v. *Green* (5). The Attorney-General is a necessary party to all suits for charitable purposes. *Hagan* v. *Duff* (6) and *Blount* v. *Viditz* (7) were relied upon by the trustees; but these were cases of named individuals. *Walsh* v. *Gladstone* (8) was a case on the mode of payment to a named institution. Here there is only indicated a general charitable purpose.

On the question of the discretion of the Court, see *Bethell* v. *Abraham* (9).

*Matheson*, *Q.C.*, and *D. F. Browne*, for the new trustees :—

The discretion may be passed on to new trustees: Lewin on Trusts, p. 613, ed. 1885. We need only satisfy the Court that we are going to spend the money for the purposes of the will. If there are trustees with a discretion, who apply to the Court and say they wish to exercise the discretion, the Court will not interfere with them. We rely upon *Hagan* v. *Duff* (6) and *Blount* v. *Viditz* (7).

There is no practice that a scheme must be settled in every case. The Court may settle a scheme; but it is a matter of discretion. The practice, we submit, in Ireland, is merely to require an affidavit from the trustees stating what are the proposed objects.

(1) 2 Ves. Sen. 87.
(2) 7 Ves. 36; 13 Ves. 416.
(3) Amb. 309.
(4) 10 Ves. 540.
(5) Ir. R. 5 Eq. 470.
(6) 23 L. R. Ir. 516.
(7) [1895] 1 Ir. R. 42.
(8) 1 Phil. 290.
(9) L. R. 17 Eq. 24.

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*v.*
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Jan. 17.

LORD ASHBOURNE, C.

This is an appeal from an order of the Vice-Chancellor, and it raises a question of interest and importance as to the practice of the Court. I need hardly say that, with respect to any case affecting the practice and ordinary method of dealing with funds in Court, decided by a Judge of the eminence and experience of the Vice-Chancellor, we should regard an appeal from his decision with great anxiety, if we felt called upon to differ from his opinion. It appears that in this case a man named Clancy made his will on the 2nd May, 1868, by which he left all his property to four trustees, the Roman Catholic Bishop of Ferns, the parish priest of Castlebridge, another priest who was the successor of the then Bishop of Ferns, and to Nicholas Harpur on trust, to pay his debts and funeral and testamentary expenses, then upon trust for his daughter Catherine for life, and after her death to apply and dispose of all said trust estates in and for such charitable objects and purposes as the said trustees or trustee should, in their or his discretion think proper, and the will then declared that the power of appointing new trustees should be vested in and exerciseable by the trustees or trustee for the time being, or by the executors or administrators of the last deceased trustee "subject to the direction following, that is to say, that, so far as practicable, the Roman Catholic Bishop, exercising such superintendence as aforesaid, and the Roman Catholic Parish Priest of the Parish of Castlebridge shall, at all times hereafter, be trustees of this my will, if willing to accept the office, and I appoint my trustees the executors of this my will."

The testator died in June, 1870, and shortly after his death his daughter, Catherine Clancy, became mentally affected, and came under the jurisdiction in Lunacy. Proceedings were taken to administer the testator's estate, and the decree was pronounced in 1871. Catherine Clancy died only last year, in 1897, and at the date of her death all the trustees named in the will were dead On the 11th June, 1897, after the death of the daughter, new trustees were appointed by the Vice-Chancellor. The Attorney-General was made a party, and we are glad that he was, because we have got great assistance in this case from the able and learned argument of his counsel Mr. Morphy. The new trustees were the

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Roman Catholic Bishop of Ferns, the Parish Priest of Castlebridge, and two other Roman Catholic clergymen. At first only two trustees were appointed, but the number was subsequently increased and filled, and now there are four trustees. The trustees applied to the Vice-Chancellor to have the money paid to them in order that they might apply it for charitable purposes under the will. The Attorney-General, who was called in to represent his views as to what was the best way to administer the funds for the benefit of the charitable purposes, argued that the best way was not to pay out the money, but to settle a scheme. In support of that view, there were two arguments addressed to the Vice-Chancellor—(1) that the personal discretion was vested only in the trustees named in the will; and (2) that it was in accordance with the practice of the Court to frame a scheme in such cases, as the money was under the control of the Court. I think that the whole structure of the will shows that all his trustees were intended by the testator to have a discretion. The words of the power of appointing new trustees show that it was to be in the power of the trustees for the time being to work out his wishes, and that the trustees, either those existing or those appointed afterwards, should be the persons to do so.

The Vice-Chancellor, upon both points, decided against the Attorney-General, and, being of opinion that there was sufficient to show the *bona fides* and honesty of the application, declined to settle a scheme, and made an order to pay out the money to the new trustees. From that order the Attorney-General has appealed, and we have heard the very able argument of Mr. Morphy. I think that in such cases the presence of the Attorney-General is of advantage in enabling the Court to come to a right decision. The Vice-Chancellor having arrived at that conclusion, we have to consider whether we ought to vary the order he has made. I am of opinion that in all cases where the trustees are appointed with a discretion, it is the usual course to pay the money out to them, but I am also of opinion that it would be clearly within the jurisdiction of the Court, to frame a scheme for the administration of the charity, if it considered it proper so to do. It is a question whether, in the judgment and discretion of the Judge, he should think it right to frame a scheme. If the Vice-Chancellor thought

that the trustees did not intend to mould this charity according to the wishes of testator, or if he questioned their *bona fides*, he would be quite within his right to settle a scheme. But, having the whole case before him, he deemed it right, in his discretion, to pay out the money to the trustees. I see no reason to dissent from that conclusion of the Vice-Chancellor, and, therefore, I think that this appeal should be dismissed; but as the appeal was brought to decide a question of principle, the Attorney-General will have his costs out of the fund.

FITZ GIBBON, L.J.:—

We all agree in holding that the Court of Chancery has jurisdiction to frame a scheme in this and in like cases. Because we are unanimously affirming that proposition, we give the Attorney-General his costs of the appeal, on which he has established it. The first question is simply one of the construction of the will. Was the discretion vested in the trustees for the time being, or only in the original trustees? Two of the original trustees were the holders of offices for the time being. The testator bequeathed the property "to the Right Rev. Dr. Thomas Furlong, or the person for the time being officiating as Roman Catholic Bishop of Ferns, the Rev. Thomas Stafford, or the person for the time being officiating as Parish Priest of Castlebridge, the Rev. Michael Warren, and Nicholas Harpur, upon trust, after payment of his debts, &c., to pay the income to his daughter for life, and *after her death* to apply and dispose of *all said trust estates* in and for such charitable objects and purposes as my *said* trustees or trustee shall in their or his discretion think proper."

I am clearly of opinion, that on the construction of the will, the word "said" does not restrict the discretion to the two trustees holding office at the testator's death, with the two trustees named, but that it extends to all the trustees for the time being, including the trustees holding office, at the daughter's death. If so, the discretion will pass on to trustees appointed by the Court, as well as to those appointed under the power contained in the will. The other discretionary powers appear to me conclusive. "My trustees or trustee" may sell the real or chattel real estates,

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farming stock, or other trust property, "*at any time or times* in any manner, and upon any terms, and *in their or his absolute discretion*, and as if they or he were absolute beneficial owners." The power of appointing new trustees is vested in "the trustees or trustee for the time being, or the executors or administrators of the last deceased trustee," subject to the direction that, so far as practicable, the Roman Catholic Bishop of Ferns and the Parish Priest of Castlebridge should at all times thereafter be trustees of the will, and the trustees are appointed to be the executors. Thus the testator treats as identical the "said" trustees, "my trustees," and "the trustees for the time being," and, if this case had not come into Court, those who held the office of trustees of the will at the time of the daughter's death would have been entitled to exercise the discretion of selecting the charitable objects for which the trust property should be applied.

Mr. Morphy was driven to argue that the original trustees could, during the daughter's life, have exercised the discretion of finally selecting the objects, so as to bind their successors, and that the successors could neither have controlled their predecessors' selection, nor made a discretionary selection themselves. Such a construction is impossible. I think that the discretion vests in the trustees for the time being, and may be exercised from time to time over any trust property not previously validly and finally disposed of. That being so, the aid of the Act for appointing new trustees is not required, but the discretion passes to trustees appointed under the new Act exactly as if they were appointed under the power in the will. I therefore hold, whether the appointment is made by the Court or not, that the new trustees have the same discretion as if they had been original trustees.

What has occurred in this case to make the settlement of a scheme obligatory? It was contended that when the money was once brought into Court by the trustees, the Court, according to its practice, should not part with it without framing a scheme. The money was brought into Court by the acting trustees on a bill filed in 1870, which stated that difficulties had arisen in the administration of the assets, so that the trustees could not safely distribute the property save under the decree of the Court. It did not state that those difficulties arose at all with reference to the

ultimate disposition of the trust property in charity. Difficulties about a farm which was under eviction, and about a debt, were stated in the bill, but the submission of the trustees to the jurisdiction of the Court contained no reservation, or even reference, as to the gift to charity. I hold emphatically that when the property was brought into Court, the trustees absolutely clothed the Court with the discretion, and confided to it the duty, of seeing that the trust property reached the proper hands, or at least was secured for the proper objects, before it parted with it. I throw no doubt upon—on the contrary, I affirm—this general jurisdiction and duty of the Court, and either before or at the appointment of new trustees, who when appointed are to be clothed with discretionary powers, the Court may and ought to consider how far their discretion should be controlled. But the view I take is this—when, at the expiration of the life estate, the Court had to determine how the charitable intentions of this testator could best be carried out, three courses were open to it—1, it could fill the trust by the appointment of trustees, and at the same time frame a scheme regulating their action, and controlling the discretion of the trustees by the judgment of the Court; 2, without appointing any trustees, the Court might frame a scheme, and distribute the money in accordance with it, under orders of the Court itself; or 3, it might come to the conclusion that the best way to give effect to the intentions of the testator, and the nearest approach to his wishes, was to appoint trustees of the character indicated by the will, give them the discretionary powers which the original trustees had had, and leave them to exercise those powers. In my opinion, bringing in the Bishop and the Parish Priest, reconstituting the body of trustees, and paying out the funds to them, to distribute according to their discretion, under the provisions of this will and the circumstances of this case, was really equivalent to settling a scheme for the distribution of the trust property. I do not question the jurisdiction of the Court to require an affidavit from the trustees, even after their appointment, as to what they were going to do with the trust funds. But if the parties applying to have the money paid out to them, in such a case, whether original or newly appointed trustees, brought in an unsatisfactory affidavit, proposing either an imprudent or an improper application of the trust funds, I

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hold that the Court both could and ought to refuse to pay out the money, and either administer the fund itself, or settle a scheme to secure its due application. In *Walsh* v. *Gladstone* (1), the Court required an affidavit, to show both that the college which was the object of the charity was a permanently established institution, and that the President of it for the time being held an office of such a permanent and responsible character as to make it safe and proper to entrust him with the application of the fund. Being satisfied upon these points, the Court paid the money out to the President, notwithstanding the opposition of the Attorney-General, who, exactly as here, insisted that a scheme should be framed. The case is identical in principle with the present one, and here we follow the same course, for the same reason, because it is the course which most closely accords with the expressed intentions of the founder. Affirming that the Court has jurisdiction to settle a scheme, and that it would be its duty to frame a scheme, if the two trustees did not indicate the intention to make a satisfactory disposition of the funds, I cannot adopt all the observations of the Master of the Rolls in *Hagan* v. *Duff* (2) in their literal sense. If the trustee was "entitled to exercise an uncontrolled discretion," the Court could not interfere with that discretion, and it would be impossible "to see that he means to exercise it," by merely refusing to "allow the fund to be paid out of Court, without an affidavit showing how he proposes to apply it." For, immediately after the money was paid, the proposed disposition might be altered, and the affidavit could not prevent the alteration. Furthermore, and especially where it is proposed to retain part, or the whole, of the fund, as a permanent endowment, it might become the duty of the trustees, as times or circumstances changed, to modify the discretion, and to alter the disposition.

In *Bethell* v. *Abraham* (3), where the question arose as to controlling the discretion of trustees in the choice of investments, Jessel, M. R., said there was a personal discretion vested in the trustees, but as soon as the fund came into Court, that was transferred to him. He said that he was not satisfied that he ought to exercise the power of controlling their exercise of discretion in the way they desired. But he seems to me to affirm the existence of

(1) 1 Ph. 290. (2) 23 L. R. Ir. 516. (3) L. R. 17 Eq. 24.

his jurisdiction; and in principle I see no difference between an uncontrolled discretion to invest, and an uncontrolled discretion to distribute or to administer.

For these reasons, I base my judgment upon my being judicially satisfied that the best *scheme of disposition* of this fund is to appoint trustees to exercise their discretion. Having been appointed, they have satisfied us, by the affidavit, that they are capable and intelligent men, who know their duties, and have reasonable ideas as to the distribution of the trust fund in a way which will accord with the testator's intentions. That being so, the Court will give them the money, and interfere no further.

HOLMES, L. J.:—

It is clear that on the true construction of the will, the trustees and trustee thereof for the time being are to have the same discretionary power to apply the property for charitable objects and purposes as is conferred upon the trustees nominated by the testator. This is made apparent both by the general language of the instrument, and especially by the direction that in appointing new trustees, the Roman Catholic Bishop of Ferns and the Parish Priest of Castlebridge should, so far as practicable, be included in the number. The bequest creates such a charitable trust as the Court of Chancery has always exercised its jurisdiction to enforce; but while it has never hesitated to act when its interposition was necessary for the protection of the fund, or for the due execution of the charitable purpose, it has not been its practice, either by framing a scheme or otherwise, to interfere with an unlimited discretion given to trustees by a testator, when there are trustees in existence fit and desirous to exercise it. In the old cases of *The Attorney-General* v. *Governors of Harrow School* (1), and *Powerscourt* v. *Powerscourt* (2), this rule is stated and acted on, although I think it also appears therefrom that the refusal to frame a scheme arose, not from a want of jurisdiction, but from what was considered to be the practice of the Court.

Mr. Morphy, representing the Attorney-General, seeks to draw a distinction between cases where the charitable fund is actually in Court, and cases where it remains in the hands

(1) 2 Ves. Sen. 551. (2) Beatty's Reports, 572.

*Appeal.* 1898.

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Holmes, L.J.

of the trustees; and contends that in the first-mentioned class it has been usual to settle a scheme. He is probably right to the extent that, under such circumstances, a scheme is often framed by the Court; but in most, if not all the cases of the kind with which I am acquainted, this has been done with the consent of the trustees. Where such consent is withheld, and where they are fit persons to exercise the discretion given them by the testator, the Court allows them to do so: *Hagan* v. *Duff* (1), and *Blount* v. *Viditz* (2).

I do not consider the case now before the Court to be similar to those to which I have been referring. In it, no doubt, absolute discretion was given to the trustees; but two of them seem not to have acted at all, and the other two presented their Bill of Complaint, praying that the trusts should be executed under the direction of the Court. When the time arrived, on the death of the tenant for life, to carry out the charitable object, all the original trustees were dead, and no new trustees had been appointed. Under these circumstances, the Vice-Chancellor was at liberty either to frame a scheme with or without an appointment of new trustees, or to appoint new trustees, observing the directions of the testator in doing so, and to allow them to exercise the discretion which the testator intended they should enjoy.

The second of these courses has been taken. The Bishop, the Parish Priest, and two other clergymen are now the trustees. They have indicated generally in their affidavit the objects to which they propose to apply the funds. They are proper, willing, and capable. Above all, they are the persons whom the testator intended should exercise a complete discretion. In a case of this kind there can be no safer guide than the great and varied experience of the Vice-Chancellor; and to say that I entirely approve of what he has done adds nothing to the weight of his judgment.

Solicitor for the plaintiffs: *P. J. O'Flaherty.*
Solicitor for the Attorney-General: *R. G. Warren.*

R. D. M.

(1) 23 L. R. Ir. 516. (2) [1895] 1 Ir. R. 42.

## IN THE MATTER OF THE ESTATE OF JOHN A. WALLINGER AND OTHERS, OWNERS AND PETITIONERS.

*Ross, J.*
1898.
Jan. 11, 21.
*Appeal.*
Feb. 4, 11, 17.

*Power to charge limited sum on real estate—General power to appoint charge—Will—General gift—Exercise of general power of appointment—Wills Act, sect.* 27.

A testator by his will declared that it should be lawful for A. by deed or writing to limit and appoint, grant, sell, release, and confirm all or any part of certain lands to any person or persons by way of mortgage or otherwise as a security for any sum not exceeding £2000, or by any such deed, writing, or by will, to charge and incumber the lands with the payment of any sum not exceeding £2000 for such use, intent, and purpose as A. should think fit to direct and appoint. A. by his will, made after the Wills Act, and which did not refer to the power, gave, devised, and bequeathed to his wife all his property real and personal, and all his estate, goods and chattels, money and charges secured upon lands of or to which he was possessed or in any way entitled.

*Held* by the Court of Appeal, affirming the decision of Ross, J., that A.'s will did not operate under sect. 27 of the Wills Act as an exercise of the power of charging and appointing in favour of the wife.

*In re Jones ; Greene* v. *Gordon* (34 Ch. Div. 65) distinguished and observed upon.

The 27th section of the Wills Act presupposes the existence of some real estate, or some personal estate, as the case may be, which is subject to a general power of appointment, and which though not the testator's property is at his uncontrolled disposition. The language of the section does not extend to the creation of property at the expense of another, or to the imposition of an otherwise non-existent charge upon the property of another, or to the conversion *pro tanto* of the real estate of another into a money charge, which if and when charged will be personal estate which the testator will have power to appoint as he may think fit, but which has no existence unless and until the testator creates it.

OBJECTION by Mrs. Roberts, the personal representative of Mrs. Martha Devonsher, deceased, to the final schedule of incumbrances.

Under the will of John Devonsher, dated the 19th of July, 1800, his son Abraham Devonsher had power by deed or will to charge the lands for sale with any sum not exceeding £2000 late Irish currency, for such use, intent, and purpose as the said

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Abraham Devonsher should appoint. The words of the power will be found set out *verbatim* in the judgment of Mr. Justice Ross, *infra*, pp. 141, 142.

After the death of his father, Abraham Devonsher, by three several deeds in pursuance of the power charged the lands with sums amounting in the whole to £1550. These charges appeared on the schedule. Abraham Devonsher made his will, dated the 26th of November, 1872, and thereby, without referring to the power, devised and bequeathed all his property to his wife Martha.

Mrs. Roberts claimed to be put upon the schedule as personal representative of Martha Devonsher for the balance of the £2000 Irish, which Abraham Devonsher had power to charge and appoint.

*Samuels, Q.C.*, for the objector :—

Under the 27th section of the Wills Act the general gift to the wife operated as an exercise of the power. The contention on the other side will be that a power to charge is not a power to appoint. But the case is covered by authority: *In re Jones; Greene* v. *Gordon* (1).

*Serjeant Campion, Q.C.*, and *Colthurst*, for the owners :—

The only question is as to the applicability of the 27th section. This was a power to create a charge on lands the property of a third party. Until the charge was created there was no personal estate of Abraham Devonsher on which the section could operate. John Devonsher created no charge: he merely empowered his son to do so. In the case cited, *In re Jones; Greene* v. *Gordon* (1), like all other cases which have dealt with the subject, there was a specific existing estate upon which this power could take effect. The testator there directed his trustees to convert and sell his estate and to invest it. There was a fund *in esse*, and nothing remained but to appoint it. At page 68 Kay, J., says :—" I pause there to observe that the power conferred by the will of John Jones was practically a power to appoint part of a residue com-

(1) 34 Ch. D. 65.

prising real and personal estate, in any manner that Mrs. Jones might think proper."

The object of the 27th section was to render reference to the power or reference to the subject-matter of the power unnecessary. The objector seeks by means of the section to give a double operation to the general disposition, first a charge, and secondly an appointment.

*Pomfret* v. *Perring* (1) is an authority in our favour; it shows that the residuary bequest cannot have the double operation contended for. The construction put by the objector on the 27th section of the Wills Act unduly enlarges its scope.

*Samuels, Q.C.*, in reply:—

This was a power to grant, limit, and appoint real estate to the extent of £2000. The donee of the power could exercise it by deed or will. If he makes a general bequest he creates assets. The 27th section includes a power to raise money: Farwell on Powers, 2nd Ed., p. 215. This was a charge to which Abraham was entitled within the very terms of the gift.

[The question was also argued whether a contrary intention was shown; but in the view taken by the Court it became unnecessary to decide this point.]

Ross, J.:— Jan. 21.

This case comes before me on an objection to the final schedule.

The material facts are as follows:—

John Devonsher, by his will, dated 19th July, 1800, devised the lands sold in this matter, in the manner therein stated. Then follows a proviso—"Provided further, and to the use, intent, and purpose, and I do hereby direct and grant that it shall and may be lawful to and for my said son Abraham, from time to time during his life, by any deed or deeds, writing or writings, to limit and appoint, grant, sell, release, and confirm all or any part or parcel of my towns, lands, tenements, and hereditaments, to any person or persons whatsoever by way of

(1) 5 De G. M. & G. 775.

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mortgage or otherwise, as a security or securities for any sums of money not exceeding in the whole two thousand pounds principal money, together with interest for the same, or by any such deed or deeds, writing or writings, or by his last will and testament in writing, to charge and incumber all or any part or parcel of my said towns, lands, tenements, or hereditaments, with the payment of any sum or sums of money, not exceeding in the whole the aforesaid sum of two thousand pounds, together with interest for the same to and for such use, intent and purpose as my said son Abraham shall think fit to direct and appoint." The will then goes on to provide that no more than two thousand pounds should be raised and charged under this proviso.

In pursuance of this power, Abraham Devonsher, by three separate deeds, raised and appointed three several sums of £750, £500, and £300, part of the £2000.

He died in the year 1880, having previously made his will dated 26th November, 1872.

In this will, in pursuance of a power of appointment contained in the will of his father John Devonsher, he appoints an annuity or jointure of £400 Irish in favour of his wife. There is no express reference in the will to the power to raise and appoint the £2000. The testator proceeds to give, devise, and bequeath to his said wife absolutely, all his property, of what nature and kind soever, real and personal, and all his estates, goods and chattels, moneys, charges secured upon lands of or to which he was possessed or in any way entitled, &c. He then appoints his wife residuary legatee and sole executrix. The objector, who now represents the wife, contends that under these words the testator appointed £296 3*s.* 1*d.*, the unappointed balance of the £2000 Irish currency to his wife.

In the case of wills before the Wills Act, the general rule is that unless there is something to show an intention to execute the power, a general devise or bequest will not operate as an execution of the power. The effect of section 27 of the Wills Act is exactly to reverse the rule. It is plain that independently of the Wills Act, the words used by the testator would not operate as an execution of the power. The whole case therefore turns upon the application of the 27th section of the Wills Act.

What is the subject matter, upon which Abraham Devonsher is to exercise his power of appointment? It is a sum of money not exceeding £2000 to be raised in some of the ways mentioned by John Devonsher. To raise the money is one thing, to appoint it when raised is another. The appointment is not to be exercised upon the realty, but upon the personalty when raised.

The first part of sect. 27 of the Wills Act has therefore no application. The second part of the section provides that "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." To construe the section logically, there must be certain specified personal estate, upon which the general bequest is to operate as an appointment. John Devonsher created no charge upon the real estate; he created no personal fund. He empowered his son Abraham to do so, but until he exercised his power it remained in his hands real estate. Abraham exercised his privilege, not to the full extent to which he was entitled. He had power to raise £2000 Irish; he only raised and appointed £1550. He deliberately abstained from raising the remainder. The main object of the section is, where there is a general bequest, to obviate an express reference to the power, but this part of it contemplates an existing fund. To hold that the general bequest can have the effect of creating the fund and then of appointing it, seems to me to unduly strain the section.

Mr. Samuels, for the objector, relied strongly on the case of *Greene* v. *Gordon* (1). The testator in that case devised and bequeathed his residuary real and personal estate to trustees upon trust for sale, conversion and investment, and directed them to hold the trust funds upon certain trusts for the benefit of his widow, his daughter, and remoter issue; he then declares that it should be lawful for his wife by will or codicil to appoint that

(1) 34 Ch. D. 65.

*Ross, J.* 1898. *In re* WALLINGER'S ESTATE.

any sum or sums of money not exceeding £20,000 should be raised and applied as she should think fit. The widow by her will, dated 1885, devised and bequeathed all her estate and effects to her daughter absolutely. The general bequest was held by force of the 27th section to operate as an appointment to the extent of £20,000. This case is clearly distinguishable. There the testator directed his residuary real and personal estate to be converted and held by his trustees. There was, therefore, an existing fund in the hands of the trustees, upon which the power of appointment to the extent of £20,000 could be exercised. Here there is no such fund; there is real estate in the possession of Abraham Devonsher, part of which was converted and appointed, and part of which was never converted into personalty.

It is unnecessary for me, owing to the view I take, to consider the question whether a contrary intention appears in the will.

I therefore over-rule the objection with costs.

W. G.

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*Appeal.* Feb. 4, 11, 17.

The objector appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ.)

*Samuels, Q.C.*, and *Ball*, for the appellant.

*Serjeant Campion, Q.C.*, and *Colthurst* for the respondent.

The arguments were the same as those reported in the Court below.

Feb. 17.

LORD ASHBOURNE, C.:—

Lord Justice FitzGibbon will give the judgment of the Court.

FITZ GIBBON, L.J.:—

The question in this case is whether a general gift of all his property to his wife, contained in the will of Abraham Devonsher, operated under the Wills Act, section 27, as an appointment of a sum of £300 Irish, the otherwise unappointed residue of a sum

of £2000 Irish, which the testator had power to charge by deed or will upon the real estate of his father, John Devonsher, for such purpose as Abraham Devonsher should think fit. The case requires careful consideration, having regard to the authorities, and to the importance of the principle involved. It is necessary to state the facts in the first instance :—

John Devonsher, the father, by his will dated July 19, 1800, charged his real estate with his funeral expenses and all his debts, in exoneration of his personal estate, also with a jointure of £50 per annum, and £1000 with interest, for his wife, and with a portion of £2000 with interest for each of his younger children. Subject to these charges, he devised all his real estate to his son Abraham Devonsher for life, with remainder to the sons of Abraham Devonsher for such an estate, not greater than an estate tail, as Abraham Devonsher should by deed or will appoint, and in default of such appointment, then to the use of the first and other sons of Abraham Devonsher successively in tail male, with remainder to the testator's other sons, if any, successively in tail male, with remainder to his daughters as tenants in common in tail male, with remainder to their issue in tail general, with an ultimate remainder to his own right heirs in fee.

After these devises, the will of John Devonsher contains powers for Abraham Devonsher during his life, by deed or writing, to limit and appoint all or any part of the lands by way of mortgage to secure any sum or sums not exceeding in the whole £2000 with interest, or by such deed or writing, or by his last will, to charge and encumber all or any part of the same lands with the payment of any sum or sums of money not exceeding in the whole the aforesaid sum of £2000 with interest, to and for such use, intent, or purpose as the said Abraham Devonsher should think fit to direct and appoint, but so that no more than one sum of £2000 should be raised, borrowed, or charged under this proviso, and that every sum so charged should be in bar and instead of, and not in addition to, any sum raised by mortgage. The will also directed that the sum of £1000 for the testator's wife, and the portions of £2000 each for his younger children, should have priority to any sum charged by his son Abraham under this proviso. Immediately after this clause, the will gave a further power to Abraham Devonsher

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by deed or will to appoint a jointure not exceeding £400 a-year, issuing out of the lands, to his wife, with powers of distress and entry, and to create a term for securing such jointure, and further to charge the same lands with any sum not exceeding £5000 with interest for portions for his children. John Devonsher died soon after the date of his will, which was proved in 1802, and Abraham Devonsher having thereupon become entitled to the estates, during his lifetime raised by separate mortgages, in pursuance of the above stated power, sums of £750, £500, and £300 Irish, leaving £300 Irish unraised, of the sum of £2000 Irish which he was empowered to charge upon the settled lands.

Abraham Devonsher made his will on November 26, 1872, and added codicils dated May 12, 1877, and July 17, 1879. He died on February 25, 1880. By his will, expressly in pursuance of the power in that behalf contained in the last will of his father, he appointed to his wife Martha Devonsher a jointure of £400 Irish charged upon all his father's lands. In further pursuance of the same power, he gave her powers of distress and entry, and he appointed the lands to a trustee for the term of 300 years to secure the jointure, and he declared a trust, if his wife should survive him, "to permit the person or persons who under his father's will should be for the time being entitled to the lands in remainder after the said term to receive the rents and profits until default in payment of the jointure."

His will then contained the following clause, which is now relied on by the appellant as operating as an execution of the power to charge and appoint the residue of the £2000 Irish, after the three mortgages:—"I give, devise, and bequeath, limit, and appoint unto my said wife, her heirs, executors, administrators, and assigns, absolutely all *my* property of what nature and kind whatsoever, real and personal, and all *my* estates, farms, houses, goods and chattels, household furniture, moneys in hand and in bank, securities for money, *charges secured upon lands*, of or to which I am possessed or in any way entitled, debts due to me, &c., whatsoever or wheresoever situate, of which I may die seized, possessed of, or in any way entitled, to her or their own use absolutely." He appointed his wife sole residuary legatee and executrix.

The codicils gave some plate and other chattels to his son John Davies Devonsher, and to his three daughters, Mrs. Augusta Rolles, Mrs. Sophia Gibney, and Mrs. Martha Matthews. Each codicil contained an universal residuary gift to his wife, and confirmed his will in every other respect.

The £300 Irish is now claimed as a charge upon the settled real estate, by Elizabeth Roberts as sole legatee and executrix of Mary Davies, who was the sister and sole next-of-kin and administratrix of Martha Devonsher, the widow of Abraham Devonsher, who survived her husband, and proved his will and codicils on February 5, 1880. It would appear, therefore, that Abraham Devonsher had a son, who would be tenant in tail of the settled lands, and also three daughters. It is not stated whether he executed the power of appointing portions not exceeding in all £5000. If Abraham Devonsher executed the power of portioning his daughters, this must have been done in express execution of the power in his father's will. If he did not, he showed his unwillingness to further burden the family estate entailed upon his son. Martha Devonsher must have been a second wife, not the mother of the tenant-in-tail or of his sisters. This case thus raises, upon the will of Abraham Devonsher and the Wills Act, section 27, the serious and important question whether a residuary devise and bequest, expressed in general terms, operates to create and pass a charge upon lands over which the testator has a general power, of appointment, although the gift purports to deal with the testator's own property only, and contains no reference to the power, unless the addition of the words "limit and appoint" to the words "give, devise, and bequeath" amounts to such a reference. In other words—if a testator happens to possess a power to charge the real estates of another by deed or will, with a specific sum of money, and to appoint that sum as he may think proper, will the words "I give, devise, and bequeath, limit and appoint all my property to my wife" operate both as an execution of the power to charge, and also as an appointment of the specific sum as a charge.

Apart from the Wills Act such a contention would be impossible; and as the Wills Act deals with general devises and bequests, it is not easy to see that the addition of the word

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"appoint" to the words of gift makes any difference in the application of the Act, though it may be relied on as some indication of an intention to execute the power. The law before the Wills Act was clear, and the effect of the Act, in cases to which it applies, is thus stated by Lord St. Leonards in *Lake* v. *Currie* (1): "It is now absolutely necessary to show a contrary intention to exclude the execution of the power, while under the old law it was needful to show the intention to exercise the power."

But the first question is whether the Act applies to this case. In my opinion it does not. Section 27 contains two clauses, the first relating to real estate, and the second to personal estate, each substantially in the same words. "A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention should appear by the will; and in like manner *a bequest of the personal estate of the testator*, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which the description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." According to its natural construction, this section appears to me to presuppose the existence of some real estate, or some personal estate, as the case may be, which is at the time subject to a general power of appointment, and which, though not the testator's property, is at his disposition under a general power. A general gift of property described as his own will then, under the section, operate to dispose of the subject-matter of the power by way of appointment. In short, the statute alters the law as to the sufficiency of general words of

(1) 2 De G. M. & G. 536.

gift to operate as words of appointment—or rather, the presumption that they are intended so to operate—in the case of property which is at the time absolutely at the testator's disposal. But I cannot think that the language of the section naturally extends to the creation of property at the expense of another, or to the imposition of an otherwise non-existent charge upon the property of another, or to the conversion *pro tanto* of the real estate of another into a money-charge which, if and when charged, will be personal estate which the testator will have power to appoint in any manner he may think proper, but which has no existence at all unless and until the testator creates it.

It seems to me that we are asked to presume the intention to create a subject-matter, in the shape of personal estate, in order that the Wills Act may operate upon it, and that this is an extension of the Act which its language does not justify, and which goes beyond the usual or natural intention of testators to which the Act desired to give effect.

In support of this view, I venture to quote a clear statement by Kekewich, J. (*In re Byron's Settlement* (1)) of his opinion of the effect of the Wills Act, sect. 27:—"This is not intended, apparently, to overlook or alter the distinction between property and power; but, on the other hand, it was intended to recognise what is familiar to all lawyers, namely, that a general power of appointment, though in technical character certainly different from property, is in substance and practice so nearly resembling it that injustice may easily be done by preserving technical rules and insisting on their application. The Act interposes to prevent that injustice, and says in effect that a man who has a general power of appointment—that is, a power to dispose of property in any way he thinks fit—is really the owner in fee-simple of the property the subject of the power, and, that being so, it is only right and fair that he should be at liberty to devise the property, and to exercise over it the right of ownership, instead of exercising the power of appointment. That, in my opinion, is the effect of the Act." If this statement is adequate, it bases the application of the Act upon the existence of the property, and the injustice

(1) [1891] 3 Ch. D. 478.

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which the Act was intended to prevent could not occur unless the subject of the power existed in such a shape that the man who had the general power of appointment over it would naturally regard himself as really the owner of it. The reasoning is wholly inapplicable to a power which requires a distinct intention, and a distinct act, to bring the subject into existence before the general power of appointment can operate upon it. This applies with special force to a general power of charging a specific sum upon a settled family estate over which the donee has other powers also. No tenant for life, donee of such a power, would regard the unexecuted power as already so much property of his own. On the contrary, he would naturally look in the first instance to the circumstances of the remainderman, and of the estate, and would never think it "right or fair" to impose the charge upon the property, or to have the intention of doing so imputed to him, unless or until he expressed an intention to that effect. For these reasons, I think that the Wills Act leaves it still necessary to show some affirmative indication of the intention to create a charge, beyond a mere general gift of what is described as the testator's own property.

The appellant chiefly relied upon the authority of Kay, J., in *Greene* v. *Gordon* (1). I should be slow to question the decision of Kay, J., if it ruled this case. But a careful examination of *Greene* v. *Gordon* (1) appears to me not only to distinguish it entirely, but to disclose indications that Kay, J., would decide against the appellant's contention here. The testator, John Jones, devised his residuary real and personal estate to trustees for sale, conversion, and investment, and directed them to hold the proceeds for the benefit of his wife and his daughter, Mrs. Greene, who was his only child, and her issue. He declared that, notwithstanding the trusts, it should be lawful for his wife by will *to appoint* that any sum not exceeding £20,000 should after her decease be levied, paid, and applied as she should think fit. The wife devised and bequeathed all her estate and effects, real and personal, to the daughter absolutely. Kay, J., thought that the case was "covered by the Act." The property, the power, and

(1) 34 Ch. D. 65.

the bequest, one and all, fell, in his opinion, and upon his construction, within the words of the Act, and accordingly he said: "As I read the statute, it is useless to speculate about the intention of the testatrix," though he had a strong suspicion that she did not intend to exercise the power. He held that the trust for conversion made the whole property one personal fund, and he held that the power was "practically a power to appoint part of a residue in any manner that Mrs. Jones might think proper," and one "which might be exercised by her simply appointing £10,000 or £20,000, as the case might be, to A. B., a stranger." He adds:—"The statute says that such a devise and bequest as she made shall include any real or personal estate which a testator may have power to appoint, in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." If he was right in thus construing the power and the will, which it is not for us to consider, no question remained except whether a contrary intention appeared by the will.

To the argument that this was not a power to appoint *a sum of* £20,000, but that a sum *not exceeding* £20,000 should be raised and paid, he answers:—"I must read the words of the section as if they referred to any exercise of every power *of appointment* which the testatrix might have, and if that is so, those words would cover a power such as this, *to appoint* that a sum not exceeding £20,000 may be raised." In this observation he was obviously referring not to any distinction between a power to charge and a power to appoint, but to the question as to the subject-matter of the power of appointment which was suggested by the absence of any indication of intention to appoint the full sum of £20,000.

His answer to a second argument, namely, that the power was like, and should be treated as, a power of revocation and new appointment, such as was dealt with in *Pomfret* v. *Perring* (1), is important to us, and shows the distinction that I take. He says:—"To that contention the answer is this, that, if she had simply said I appoint £20,000, which I have power to appoint under my husband's will, that would have been a good exercise of the power, and there would have been no revocation," or "it would

(1) 5 D. M. & G. 775.

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only be a revocation to the extent to which it defeated the provisions in default of appointment in the husband's will." I cannot believe that he intended to convey that a simple appointment either of £20,000, or still less of all his property, to a stranger, contained in the will of a testator who happened to have a power, which he had not otherwise executed, to charge a settled family estate with a definite amount, would, without any reference whatever to the power, and without any evidence whatever that the testator had not £20,000 of his own property to answer the term of his gift, both create the charge and pass the amount of it to the legatee. It is not alleged that Abraham Devonsher had no property of his own to answer the residuary gift to his wife. For these reasons I do not think that *Greene* v. *Gordon* (1) governs this case.

The principle of *Pomfret* v. *Perring* (2), however, seems to me to bear, *e converso*, on the question before us. There the donee of a power partially executed it, reserving power of revocation, and afterwards, by will, expressly by virtue of every power in the settlement or otherwise howsoever, appointed all the property which she had power to appoint. It was held that the will operated on the unappointed part only, and was not an exercise of the power of revocation and new appointment, on the ground, as put by Knight-Bruce, L.J., that every word of the will might be satisfied without ascribing to the testatrix any idea of dealing with the power of revocation, or the property subjected to it. Turner, L.J., says, "To show that a power of this description has been exercised, it is not enough to show an intention to appoint; an intention to revoke the former appointment ought also to be shown." The preliminary intention to revoke before re-appointing is in a very similar position to the intention to create a charge before appointing it, and it seems to me that the observation of Turner, L.J., may be applied to the statutory presumption of intention under the Wills Act, section 27. Here we have no indication of an intention to charge, as distinguished from appointing. The Wills Act creates a presumption of an intention to appoint only, and I think we may well say "It

(1) 34 Ch. D. 65. (2) 5 D. M. & G. 775.

is not enough to show an intention to appoint; an intention to charge ought also to be shown."

*Lake* v. *Currie* (1), which I have already cited for another purpose, has no bearing in favour of the appellant. The testator there had two estates; of the first (the Aston-Clinton estate), he was tenant for life, under a settlement made by himself, with remainder to his son in fee, with an ultimate reversion to himself in fee. This was an estate, therefore, which the settlor, the testator, would not calculate on falling in, and there was no power of appointment. The other estate was settled in trust for himself for life, then as he should appoint, and in default of appointment, to sell and divide the money among his daughters, with an ultimate trust for himself. He had no other real estate. By his will he confirmed the settlement, and made a general disposition of his real estates. Lord St. Leonards held, without any doubt, that the confirmation applied to the estate the settlement of which could not be disturbed, and that the general devise affected the estate of which he had power to dispose. In coming to this conclusion, he made observations indicating the way in which "contrary intention" may appear. He said that the will referred to the settlement, and it is clear, he says, that "by so doing, he must be taken as knowing, if not the exact terms, yet at least the general effect of that settlement."

This observation leads me to the question of "contrary intention" upon Abraham Devonsher's will. If I had felt myself coerced to hold that the Wills Act applied, speaking for myself, I should have held that the power to charge the £300 was not exercised, because a "contrary intention" appeared by the will. In *Greene* v. *Gordon* (2), Kay, J., in coming to the conclusion that he could not find any indication of a contrary intention in the will of Mary Anne Jones, where there was nothing but an absolute bequest, without any contrary or explanatory context whatever, said that he was perhaps aided in coming to that conclusion by the fact that the person to take the benefit under Mrs. Jones's will was her only daughter. Contrast that faint indication of intention with what we have upon the will of Abraham

(1) 2 De G. M. & G. 536. (2) 34 Ch. D. 65.

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Devonsher, read, as we have a right to read it, by the light of the circumstances of his family, and of the property. He recites the jointuring power in his father's will, and three times in his own will he expressly appoints "in pursuance of that power." The first trust which he declares of the term to secure the jointure is to permit the person who, *under his father's will*, is for the time being *entitled to the lands in remainder* after the said term—*i.e.* his son as tenant in tail—to receive the rents and profits of the lands until default in payment of the jointure. His wife takes her jointure, and has it secured to her, expressly under the recited power in John Devonsher's will. Is it conceivable, if her husband intended to give her £300 Irish more at the expense of his son, under another power in the same will, that he would not have said so, or that he would not have made some reference to the power? The universal gift of his own property to his wife immediately follows the expressed exercise of the recited power of jointuring her out of the settled property. No doubt the cumulative words "limit and appoint" follow the words "give, devise, and bequeath," but, as I have already observed, the words in the Wills Act are "general devise" and "bequest," and, if Abraham Devonsher had used the word bequeath only, the application of the statute to the £300 Irish must have been the same. It appears to me that we cannot distinguish the effect of the gift in the will from that of either of the general residuary gifts in the codicils. "Charges secured upon lands" are mentioned, but these are only items in the list of the testator's own property, and a "charge secured upon lands, of or to which I am possessed or entitled," is a strange way of indicating an otherwise unexecuted power to charge estates settled on his son. The testator could of course charge them if he wished, but they could not be charged without either an actual declaration of his intention, or bringing in the Wills Act to impute that intention to him. Upon the question of contrary intention we must look to the whole will, and the absence of any reference to the power in the residuary gift to his wife, the references to other powers, the trust for the benefit of those entitled under the settlor's will, until default in paying the jointure, all make it more easy to reach the conclusion that Abraham Devonsher has sufficiently indicated an intention not to exercise

by his will the power of raising and appointing the residue of the sum of £2000 Irish, which he had not raised by mortgage.

In our opinion, the decision of the Land Judge was right, and the appeal must be dismissed with costs.

WALKER, L.J.:—

I concur in the judgment of Lord Justice Fitz Gibbon that the residuary devise and bequest in the will of Abraham Devonsher does not operate by virtue of the 27th section of the Wills Act as an exercise of the power given him by his father's will to charge a sum of money on the settled lands, and to appoint the same when charged. I rest my judgment on this ground alone, and do not think it necessary to say anything about the question of "contrary intention."

HOLMES, L.J.:—

In concurring with the judgment of the Court I desire to rest my decision solely upon the proposition fully developed by Fitz Gibbon, L.J., that the property which under the 27th section of the Wills Act is to be included in a bequest of property described in a general manner, is confined to property already in existence, and does not extend to a fund that can only come into existence by the exercise of a power to charge some other property therewith. In other words, I am of opinion that the 27th section while making the general gift operate as an execution of a power to appoint a fund in existence, does not make it operate to create the fund that is to be the object of the power of appointment. This was the view taken by Mr. Justice Ross; and his judgment seemed to me sound and convincing when I first heard it read. I did not then know of the case of *Greene* v. *Gordon* (1). When I was referred to that authority, I felt that it bore a strong resemblance to the present case, and that the principle acted on by Ross, J., ought to have led Kay, J., to a different conclusion. It is true that Mr. Justice Kay explains the will with which he was dealing and under which the power to appoint arose, as if it gave a

(1) 34 Ch. D. 65.

*Appeal.* 1898. *In re* WALLINGER'S ESTATE. Holmes, L.J.

power to appoint an existing fund; but if I turn from the language of his judgment to the will itself it seems to me that in that case, just as in this, the fund had first to be created. Any decision of this distinguished Judge deserves the greatest attention, and I have given *Greene* v. *Gordon* (1) careful consideration. It was, however, somewhat perfunctorily argued; and as there was no appeal, I am not bound to follow it.

It is unnecessary for me to consider whether a contrary intention appears by the will; but I may say that I should find much difficulty in discovering such an intention in the face of decisions like *Lake* v. *Currie* (2) and similar authorities.

Solicitor for the objectors: *Irwin.*
Solicitor having carriage: *Corker.*

G. Y. D.

(1) 34 Ch. D. 65. (2) 2 De G. M. & G. 536.

*Ross, J.*
1897.
July 9, 23, 26.

IN THE MATTER OF THE ESTATE OF ROBERT SWANTON, OWNER; JOHN ATKINS, PETITIONER. AND IN THE MATTER OF THE ESTATE OF ROBERT SWANTON AND HENRY FAIRTLOUGH, OWNERS; SAME PETITIONER. AND IN THE MATTER OF THE PARTITION ACTS, 1868 AND 1876. AND IN THE MATTER OF THE ESTATE OF ROBERT SWANTON, OWNER; SAME PETITIONER.

*Statute of Limitations—Charge on land—Mortgage executed by owner after absolute order for sale.*

Notwithstanding an absolute order for sale, made on an incumbrancer's petition, the owner can create a valid incumbrance on the lands ordered to be sold; and such incumbrance is protected by the absolute order for sale against the operation of the Statute of Limitations.

*In re Nixon's Estate* (I. R. 9 Eq. 7) considered.

HEARING of final schedule of incumbrances.

Objection by Cooper Haffield and Alexander Pope Foott, executors of Mary Madeline Meade Saunders, deceased, claiming to be placed upon the schedule for the sum of £398 8*s.*, due on foot of a mortgage, dated the 9th of April, 1877, made by Robert Swanton, the owner in the first and third matters, to the objectors' testatrix for £200 and interest. On the construction of this mortgage the Court held that it only comprised the lands of Ballydehob in the county of Cork, sold in the first matter, for which an absolute order for sale had been made on the 27th July, 1875, and did not include the share of a head rent issuing thereout, to which the owner was entitled, and for the sale of which share an absolute order for sale in the third matter had been made in 1883. The three matters mentioned in the title had been consolidated. The petitioner (who was a *puisne* incumbrancer) relied on the Statute of Limitations, alleging, as was admittedly the fact, that no payment of principle or interest on foot of the objectors' mortgage was made since the month of January, 1880.

*Ross, J.*
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*In re* SWANTON'S ESTATE.

*Sugrue*, for the objectors:—

It has been settled that an absolute order for sale operates in favour of every incumbrancer to prevent the Statute of Limitations from running: *In re Colclough's Estate* (1); *In re Nixon's Estate* (2). As decisions upon the points actually determined, irrespective of the reasons assigned for the judgments, these authorities have been long held to be binding. In recent years they were quoted before Monroe, J., and invariably recognized by him as conclusive: *In re Stinson's Estate* (3); *Irish Land Commission* v. *Davies* (4); *In re Ebbs' Estate* (5); *In re Belton's Estate* (6). The only ground open for distinguishing the present case, and excepting it from the general principle, is that here (so far as the mortgage affects the lands only) the absolute order was made prior to the mortgage. But this cannot prejudicially affect the rights of the mortgagee. Notwithstanding the order for sale, the owner could create a valid charge upon the lands: *In re Estate of Bunton, Trustee of Scanlan* (7); Madden's Practice Land Judges (3rd Ed.), 60. If incumbrances can be created after the absolute order for sale, it would reduce the principle of *In re Nixon's Estate* (2) to an absurdity to hold that every such subsequent incumbrancer must take independent proceedings to protect himself against the Statute of Limitations. There is no warrant in law or common sense for such an argument.

*Ronan, Q.C.*, and *Conner*, for the petitioner:—

The absolute order for sale converts the land into money for the benefit of the incumbrancers on the land then existing. That is the construction put upon the Landed Estates Court Act by Lord Justice Christian in *In re Nixon* (2). Nothing can be clearer than the words of the Lord Justice of Appeal. The proceeds of sale are adjudged by the order for sale to be distributable among the incumbrancers, and he defines the incumbrancers to be "those whose claims *then*, i.e. at the date of the order, bind the land"—language repeated by Monroe, J., in *In re*

(1) 8 Ir. Ch. R. 330.
(2) I. R. 9 Eq. 7.
(3) 29 L. R. Ir. 490.
(4) 27 L. R. Ir. 334.
(5) 31 L. R. Ir. 95.
(6) [1894] 1 L. R. Ir. 537.
(7) [1897] 1 L. R. Ir. 462

*Stinson's Estate* (1), as defining the position of incumbrancers other than a petitioner. How could it be alleged that Mrs. Saunders had an incumbrance binding the land on the 27th July, 1875, when her mortgage had no existence until the 9th April, 1877? *In re Scanlan's Estate* (2) was a very special case, and at the most established the right of the applicant to the extension of the receiver appointed over the estate. There was no question at all as to the Statute of Limitations (3).

*Matthew J. Bourke, Q.C., Seymour Bushe, Q.C.*, and *P. D. Fleming*, appeared for the owner.

July 26.

Ross, J. :—

As to the objection filed by the executors of Mrs. Saunders, the facts on which the question arises are as follows:—The owner was entitled to four-sixths of the lands and a head rent. An absolute order for sale of the lands was made in 1875, before the mortgage from the owner to Mrs. Saunders of the 9th April, 1877, was executed. An absolute order for sale of the head rent was made in 1883, and the two matters have been since consolidated. Two points have been argued. First, Does the mortgage convey not merely the lands but the head rent? I have read the deed. Neither in its recitals nor in the operative part is there a reference to anything except the estate in the lands. There are no general words nor any language under which the head rent could pass, and I decide that it is a mortgage of the lands and not of the head rent.

The next point is, Does the absolute order of 1875 prevent the operation of the Statute of Limitations? In the case of *Colclough's Estate* (4), decided in the year 1858, the Court of Appeal in Chancery held that the effect of the order for sale was to prevent the operation of the statute against charges affecting the lands. The question came to be reconsidered in *Nixon's*

(1) 29 L. R. Ir. at p. 495.

(2) [1897] 1 Ir. R. 462.

(3) The question whether the head-rent was comprised in the mortgage was also argued, but no question of general principle was involved, the contention entirely turning on the peculiar frame of the deed.

(4) 8 Ir. Ch. R. 330.

*Ross, J.* 1897. *In re* SWANTON'S ESTATE.

*Estate* (1) before Mr. Justice Lawson and Lord Justice Christian, and the decision in *Colclough's Estate* (2) was followed, but the reasoning of the Court below was severely handled. Both Lawson, J., and Christian, L.J., were of opinion that the views of Lord Chancellor Brady were quite unsustainable. Lord Justice Christian thought that the reasons given by Lord Justice Blackburne for his judgment could be sustained, namely, that the order for sale was to be deemed to have been made on behalf of everybody interested in the estate. "The form of the order for sale," says Christian, L. J., "is that the lands be sold for the purpose of discharging incumbrances thereon. Two things seem to be thereby adjudged—first, a conversion of land into money; second, a distribution of that money among the incumbrancers, that is to say, among those whose claims *then*, *i.e.* at the date of the order, bind the land." This language was strongly relied on by Mr. Ronan for the petitioner in opposing the objection. Now, do these words of Christian, L. J., mean that a complete conversion takes place at the date of the order? If they do, all I have to say is that his language is in direct opposition to the practice of the Court before, and after that judgment. That judgment was delivered in 1874. Before that time, and since, it has been always the practice of the Court to put on the schedule not only mortgages by deed but judgments registered as mortgages after the absolute order. The practice has been unquestioned during all these years. It would be unjust to alter it now. It may be that the judgment mortgage, or the mortgage by deed, has the effect of a reconversion; or that inasmuch as only so much of the land is to be sold as is required for the discharge of incumbrances, the effect of the absolute order in working a conversion is to be measured by its potentiality. Accordingly, so much of the lands as is required to be sold to satisfy incumbrances is converted, and the owner remains seised of the rest of the lands as real estate.

I do not purpose to consider the cases on conversion cited during the argument. The effect of the absolute order for sale in the Land Judge's Court depends on the construction of the statute, and the practice is too well settled to be departed from

(1) Ir. R. 9 Eq. 7. (2) 8 Ir. Ch. R. 330.

now. I, therefore, hold that the Statute of Limitations has no operation on this charge. *Ross, J.* 1897. *In re* SWANTON'S ESTATE.

Solicitor for the objectors: *Foott.*
Solicitors for the petitioners: *Babington & Winder.*
Solicitor for the owner: *D. O'Donovan.*

W. G.

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## WOODHOUSE *v.* NEWRY NAVIGATION CO. (1).

*Appeal.* 1897. Nov. 30. Dec. 1.

*Mandatory injunction—Exercise of statutory powers—Damages in lieu of injunction—Acquiescence.*

The defendants were a corporation, constituted by Act of Parliament, for improving the navigation of the Newry River and Carlingford Lough. In 1884 they obtained a further Act of Parliament, which Act expressly referred to certain oyster beds in the lough, the property of the original sole plaintiff, as equitable tenant for life, and provided that the defendants should, during the construction of their works, protect these oyster beds from injury. Between May, 1890, and January, 1891, the defendants cast a quantity of stones, ballast, and rubbish upon a portion of the ground within the ambit of the oyster beds. They were expressly warned against so doing by the plaintiff and his lessee, but the present action was not commenced until 1895. It was proved that the expense of removing the deposit and restoring the beds as far as possible to their original state would occasion an expense to the defendants considerably out of proportion to any advantage the plaintiff would derive from such restoration. The trustees of the property, who intervened in the action, having insisted on a mandatory injunction instead of damages:—

*Held*, that there was no acquiescence which would deprive the plaintiffs of their right to such relief, and that they were entitled to an injunction directing the defendants to remove from the oyster beds the ballast and rubbish so deposited, and to restore them to their previous condition and levels.

IN the statement of claim, the plaintiff stated that he was the owner of certain oyster beds in Carlingford Lough, situate at Omeath, in the county of Louth. He had not any estate or interest in the fore-shore, but his father, John Obins Woodhouse, had obtained a license for the oyster beds, and the plaintiff stated that he was entitled to his father's rights as licensee.

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L.JJ.

*Appeal.* 1897. WOODHOUSE v. NEWRY NAVIGATION Co.

The defendants were a Company incorporated by statute 10 Geo. 4, c. cxxvi., and they obtained in 1884 a further Act, 47 & 48 Vict. c. cxxxviii. By this latter Act the defendants were authorised to make and maintain the works mentioned in the Act for improving the navigation of Carlingford Lough and the Newry River in the line, and according to the levels, shown on the deposited plans. The works authorised were the excavation of a navigable channel in the Newry River and in Carlingford Lough.

Section 7 of the Act stated that Curran Obins Woodhouse (the plaintiff), of Omeath Park, is, or claims to be, the owner of certain oyster beds in Carlingford Lough, the limits of which were defined by a certain license, dated the 4th of June, 1866, granted to John Obins Woodhouse, deceased. Sub-sect. 5 of sect. 7 was as follows:—"In addition to the foregoing provisions for compensation the Company shall, during the construction of the said works, make and maintain all such works, matters, and things as may be necessary or proper for effectually protecting from injury, hurt, or damage, all and every part of the Omeath oyster beds not comprised within the limits aforesaid" (*i. e.* within the limits of deviation).

The defendants employed steam dredges for several months in carying out their works, and in May, 1890, and for some months after, deposited large quantities of ballast, stones, and rubbish, upon the plaintiff's oyster beds outside the limits of deviation. The last act of trespass was in January, 1891. The plaintiff had let a portion of the oyster beds to one Mussen, for fifteen years, from the 1st January, 1888, at £50 pounds a-year. In or about the months of November and December, 1890, the plaintiff and Mussen wrote letters to the defendants calling attention to these acts of trespass. The entire area of the oyster beds comprised in the license amounted to about 60 acres, and the portion upon which the defendants had cast the ballast extended to about ten acres.

In June, 1895, the plaintiff brought an action against the defendants for an injunction to remove and clear away from the oyster beds the ballast and rubbish so deposited, and to restore them to the condition and levels they were in previously.

The defendants filed a defence, traversing the averments in the statement of claim.

On the 17th June, 1896, the Vice-Chancellor pronounced judgment, and gave the plaintiff a mandatory injunction against the defendants, directing them to raise and remove all stones, ballast, and other rubbish from the oyster beds. The defendants appealed to the Court of Appeal, and on the hearing of the appeal, produced further evidence, from Mr. Barton, C.E., and other witnesses, in addition to that used at the hearing, for the purpose of showing that damages would be a sufficient compensation to the plaintiff, and that it would be practically impossible to remove the ballast. On the hearing of the appeal, by consent of both parties, it was referred to Fitz Gibbon, L.J., to ascertain the amount of the damage. The case was heard before Fitz Gibbon, L.J., with *viva voce* evidence, and on the 1st March, 1897, his Lordship gave judgment awarding £600 to the plaintiff.

It transpired subsequently that the property in the license was not vested absolutely in the plaintiff, but in the trustees under his father's will. The trustees then applied for leave to appear and be heard in the case. The order of Fitz Gibbon, L. J., awarding damages was set aside, and the case was re-heard by the Court of Appeal, on the 30th November, and 1st December, 1897. The trustees refused to accept damages, and insisted on a mandatory injunction.

*Serjeant Dodd*, and *S. L. Brown*, for the appellants:—

The plaintiff is not entitled to the mandatory injunction which he obtained, upon three grounds:—(1) Acquiescence; (2) Difficulty and expense of carrying out the order, and (3) The fact that it is practically impossible to carry out the order, *i.e.* to restore the oyster beds to the condition they were in before: *Blakemore* v. *Glamorganshire Canal Company* (1); *Lady Stanley* v. *Lord Shrewsbury* (2); *Krehl* v. *Burrell* (3). As to the lapse of time, it was assumed in *Gaskin* v. *Balls* (4) that a lapse of five years was fatal. The plaintiff can have his relief in damages: *Senior* v. *Pawson* (5);

(1) 1 M. & K. 154.
(2) L. R. 19 Eq. 616, 620.
(3) 11 Ch. D. 146.
(4) 13 Ch. D. 328.
(5) L. R 3 Eq. 330.

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*Gaunt* v. *Fynney* (1). As to the second and third grounds, in *Shelfer* v. *London Electric Lighting Company* (2), Smith, L. J., laid down four grounds, which would induce a Court to award damages instead of an injunction, and we submit that this case comes within those.

*Ronan, Q.C., Meredith, Q.C.*, and *Russell*, for the trustees :—

There is a distinction to be drawn between the cases cited by the appellants and the present. They were almost all cases of injunction for interfering with light and air, and in those cases the trespass was committed on the defendant's own property; here it was committed on the plaintiff's. The rule of law laid down by Lord Westbury in *Isenberg's Case* (3) does not apply to cases of trespass on another person's land: *City of London Brewery Company* v. *Tennant* (4). There is no particular difficulty in carrying out the order, save for the expense, and we are entitled to the order: *Whitwham* v. *Westminster Brymbo Coal Company* (5).

On the question of *laches*, see *Imperial Gas Light Company* v. *Broadbent* (6); *Three Towns Banking Company* v. *Maddever* (7). Moreover, there was a statutory duty imposed on the defendants by section 7 of the Act of 1884. The acts of trespass were committed in defiance of a statutory duty, and equity will always enforce a plaintiff's rights in such a case: *Herron* v. *Rathmines Improvement Commissioners* (8).

Dec. 1.

LORD ASHBOURNE, C. :—

This case has been so often before us, and we have now heard the present appeal at such length that we have had full opportunity of considering it in all its bearings, and in every point of view. The Court has made efforts from time to time to bring about a solution, satisfactory to all the parties, and that would have the effect of giving compensation to the plaintiff. But these efforts

(1) L. R. 8 Ch. 8.
(2) [1895] 1 Ch. 322.
(3) 3 D. J. & S. 263.
(4) L. R. 9 Ch. 212.
(5) [1896] 1 Ch. 894.
(6) 7 H. L. Cas. 600, 612.
(7) 27 Ch. D. 523.
(8) [1892] A. C. 498.

failed, and the plaintiff, having withdrawn, has left in his place and called into existence the trustees of his family settlement, who have been represented by counsel before us, and we are now called upon to give the judgment which the law requires, having regard to nothing else but legal rights. The action was commenced on the 20th June, 1895, and the statement of claim states the facts shortly. It appears that the plaintiff himself is the owner, but a limited one, of a number of oyster beds at Omeath in the county of Louth and the layings and protective works connected therewith, and the defendants are a corporation established at first under the Act of Geo. 4. They afterwards obtained the Newry Navigation Act of 1884, which authorized them to make certain works and to do acts to assist navigation. That Act of 1884 (47 & 48 Vict. c. cxxxviii.) is an Act that contains many clauses which were closely construed when passing through Parliament. It contains distinct statements as to the oyster beds. Section 7 of the Act states in the marginal note that it is for the protection of Curran Obins Woodhouse, Esq. It contains seven sub-sections about a number of matters to be kept in view by the Commissioners during the construction of the works. Then it says in the 5th sub-section [His Lordship read sub-section 5, *ante*, p. 162].

It appears that the plaintiff at an early point served notice on the defendants drawing their attention to the necessity of observing everything necessary for the protection of the oyster beds, and the Commissioners thinking they were within their rights, or that they might run the risk, thought proper to ignore that section altogether. These facts are stated in the 10th paragraph of the statement of claim, which states that "the defendants recently employed steam dredges for several months and deposited enormous quantities of ballast upon the oyster beds outside the limits of deviation, burying acres of the beds lying outside the said limits under mud and stones, in some places to the depth of four or five feet." That being the state of facts the plaintiff brought an action for a mandatory injunction asking for an order "that the defendants should forthwith raise, remove, and clear away from the aforesaid oyster beds outside the said limits of deviation all such mud, stones, ballast, and other rubbish as have been at any time deposited by the defendants, their agents, or servants upon the Omeath oyster beds,

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and restore the said oyster beds to the condition and levels they were in previous to the deposit of the said ballast, mud, stones, and rubbish."

When the defendants came to make their defence they did so without any waste of space or words, and put forward without hesitation what their defence was. They denied everything; they denied that they did the acts complained of, but there was no defence of confession and avoidance, or any statement about the expense or impossibility of complying with the order to remove the deposited matter. It may be that afterwards in evidence they put forward a more extended case, and Mr. Brown, when conducting their case, with care and skill, directed attention to these topics in the examination of the witnesses.

Now that we have more light and wider knowledge of these matters, it appears that the 10th paragraph of the statement of claim is substantially borne out, and that the defendants did for four months deposit, by working steam dredges, rubbish and stones on the oyster beds to the depth of 4 or 5 feet. Those may be taken to be the facts. The Vice-Chancellor made an order for a mandatory injunction, that being the remedy asked for and which he thought he could not withhold.

The whole case must be taken with reference to the Act of Parliament which the defendants were bound to observe, and to which I have already referred:—"In addition to the foregoing provisions the Company shall during the construction of the said works make and maintain all such works, matters, and things as may be necessary or proper for effectually protecting from injury, hurt, or damage, all and every part of the Omeath oyster beds not comprised within the limits aforesaid."

That is a statutory obligation binding on them, and if they departed from it they are liable to a mandatory injunction to compel them to undo the acts they had done. I think the order of the Vice-Chancellor is right, and should be affirmed.

There was a case referred to dealing with statutory obligations: *Herron* v. *Rathmines Improvement Commissioners* (1), where the House of Lords held that this Court was wrong, in an effort of

(1) [1892] A. C. 498.

ours, to hold that the works executed were a compliance with the Act of Parliament; and the House of Lords held that the requirements of the Act of Parliament in that case must be observed, and that it was not possible to get out of it on the ground of convenience or expediency. The first paragraph of the marginal note states:—"Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provision on his behalf. Nor can any Court remodel arrangements sanctioned, or replace conditions imposed, by Act of Parliament." The Lord Chancellor, Lord Halsbury, in delivering the judgment of the House of Lords, emphasizes the duty of obeying the terms of the Act of Parliament; and Lord Macnaghten says, at p. 523: "The principles applicable to such cases are well settled. Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment, so far as it makes provision on his behalf. It is idle for the promoters to say that they have given him all that he can want, or something just as good as that, which the Act required them to give, or even something still better, if he only knew his own interest. It is enough for him to show that the thing which is offered is not the thing which the Act said he was to have. It is too late to call for a fresh deal at that stage of the game. Nor is it I think within the province of any tribunal to remodel arrangements sanctioned by Parliament, or to relax conditions which the Legislature has thought fit to impose. If the promoters say that the alterations complained of are not important enough to justify the intervention of the Court, it is for them to make out that defence. And they must, I apprehend, make it out clearly and satisfactorily."

The plaintiffs here as trustees now, at the eleventh hour, come in and say that they accept that view, and that they will have nothing except a strict observance of the Act of Parliament. Whether they are wise or unwise, it is not for me to say,

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although I may have a clear view of the matter; they are entitled to have an affirmance of the order of the Vice-Chancellor as that is in accordance with law.

On the subject of costs we do not interfere with the order of the Vice-Chancellor; we give no costs in this Court, Mr. Woodhouse having by his conduct acquiesced in the acts done for so long a time, and the trustees having come in only at the eleventh hour. We therefore affirm the order of the Vice-Chancellor, and dismiss the appeal, but without costs.

FITZ GIBBON, L. J. :—

I concur. Speaking with the other members of the Court, I think that our duty is clear. But speaking personally, from a knowledge of the case larger than that of my colleagues, I am very sorry for the result. I read now what I wrote at an earlier stage: "The mandatory injunction must have put the defendants to trouble and expense far in excess of any sum that could reasonably be awarded by way of damages, and that method of remedying the wrongful acts of the defendants would have been equally unsatisfactory to Mr. Woodhouse, for he could not get any money compensation, if the foreshore was restored to its original condition before the expiration of the lease to his tenants." That applies *a fortiori* to the trustees, whose estate is, in effect, postponed to Mr. Woodhouse's life-interest, except for the purpose of securing the annuities for his sisters.

The only question now is whether we can withhold the remedy of a mandatory injunction from the plaintiff? The cause of action is trespass, both wilful and reckless. The acts were committed upon a portion of the foreshore which, though not the plaintiff's private property, is a place over which he has certain rights of occupation, with which the trespass directly interferes. His rights were known to the defendants; the statute obtained by themselves recites those rights, and binds the defendants to respect and protect them; it specifically identifies the oyster beds, and (section 7) it states that their limits were defined by the license, June 4, 1866, granted to John Obins Woodhouse, deceased. Section 7, sub-sect. 5, provides, in addition to provisions for compen-

sation, "the Company shall, during the construction of the said works, make and maintain all such works, matters, and things as may be necessary or proper for effectually protecting from injury, hurt, or damage, all and every part of the Omeath oyster beds not comprised within the limits aforesaid." Yet the engineer of the defendants, in the construction of the works, did the acts complained of, and seriously and extensively damaged the defined oyster beds, without inquiring or knowing whether he was trespassing or not. The law, which protects rights as well as property, describes such conduct as wilful and reckless trespass. It is the same as if a man blindfold drove a horse and cart headlong through his neighbour's shop windows, with the additional element of lawlessness that he was forbidden by special Act of Parliament to go there at all!

*Richards* v. *Richards* (1) clearly lays down that a Company who have obtained powers to construct works are bound to exercise their powers in a reasonable way, and may not cause more damage than the necessity of the case requires. When a party whose powers are defined by statute, goes beyond his powers, though he believes that he is within them, he is transgressing both the general law and also his own special Act of Parliament. His conduct is rendered as morally, as it is legally, indefensible, if his Act defines his powers by metes and bounds, which he does not take the trouble to think of regarding. A Court of Justice must have some very clear legal or equitable ground, before it refuses to require a man to obey the express law. Persistent disobedience of a statute, causing continuing damage to another, and interfering with his known, defined, and protected right, cannot be placed in the same category of venial trespasses with interference with lights, or trespass across the uncertain border of another man's land, where the wrongdoer honestly believed that he was doing no wrong, and where such a belief, though mistaken, might easily exist.

In this state of facts, the defendants must find some equitable ground for withholding from the plaintiff a mandatory injunction to compel them to desist from their illegal and

(1) Johns. 255.

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injurious conduct. Two grounds have been suggested. The first is acquiescence. I cannot answer that in better words than were used by Mr. Meredith, when he said—"Quiescence is not acquiescence. Before you convict a man of acquiescence in his own wrong, you must plead it against him, and must formally call upon him to explain the conduct, which you charge as evidence of acquiescence." That has not been done here. But upon the evidence, acquiescence is not proved, even if it had been pleaded. In June, 1890, and October, 1890, notices were served by Woodhouse, and by Mussen, his lessee, warning the defendants that they were trespassing. Since then there has been no expense incurred, no act done, no alteration of *status* on the part of the defendants, which was, or could have been, induced by any action, or even inaction, of the owners of the oyster beds, and there is therefore no ground for refusing them relief, or for altering their remedy.

In *Herron* v. *Rathmines Improvement Commissioners* (1), the Master of the Rolls said:—"To amount to acquiescence there must be not alone knowledge, but conduct from which the defendants would be justified in inferring that the plaintiffs did not mean to complain of what was done." He granted a mandatory injunction involving vast and unprofitable expenditure: this Court reversed his decision: but the House of Lords restored it, and in delivering judgment Lord Halsbury said, that it was not in the province of any Court to alter the express provision of a statutory enactment. In that case the works, while in progress, were perfectly open; the plaintiffs could see them going on, they knew their own rights, and it was proved that some of them had from time to time visited the place. Here it is not proved that Mr. Woodhouse, from the date of his cautionary notice until the trespasses were completed, knew anything about the defendants' act. They, not he, were acting at their peril. Therefore, the defence of acquiescence fails.

The next ground alleged is the impossibility of complying with the order. On legal principle, this defence is almost impossible, where the wrong complained of is a continuing illegality

(1) 27 L. R. Ir. 179, 206.

causing damage, sometimes damages are given in place of an injunction, if they will afford complete relief. In this case I go further, for I doubt that a mandatory injunction can give relief as complete as damages, for many reasons. Owing to the nature of the foreshore, to the extent of the spoilbanks thrown upon it, to the action of time and tide, and to the nature of the oysters, I think it more than doubtful whether the oyster beds can ever be restored to the same condition in which they were before the trespass. But physical impossibility is not pleaded, and the case presented before the Vice-Chancellor made out no great difficulty, nor any very inordinate expense. When the defendants came here, and asked to substitute damages for the injunction, their allegation of impossibility was rested on a paragraph of Mr. Barton's affidavit, in which he estimated the quantity of stuff deposited by the defendants, and now remaining on the plaintiff's oyster beds, at about 15,000 cubic yards, and the cost of removing it at £1200 or thereabouts. This is not proof of impossibility; the expense and trouble are only in direct *ratio* to the extent of the trespass, and those who wrongfully put the stuff there can and must take it away.

The Vice-Chancellor's judgment is to restore the oyster beds to the same condition and levels as before the deposit of stones and ballast by the defendants. It may be impossible to make them as good as they were before, but the defendants must do their best, and if the plaintiff seeks to attach them, they can show that they have done their best to obey the order. We cannot deprive the plaintiff of the right, to which he is entitled, of making the defendants undo their own wrongful act, so far as it is reasonably possible to do so. At the former hearing the Court pressed on the plaintiff, and he recognised, the expediency of taking compensation in preference to requiring the defendants to expend more money in unprofitable dredging. My colleagues took advantage of my absence to make me an arbitrator. By action on the part of the reversioners, which the Court could neither anticipate nor control, it has become impossible to settle the action on the basis of compensation. I am sorry for this result. I believe it to be injurious to all parties; but the Court is not responsible for it.

The Court went out of its way to substitute compensation for

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a mandatory injunction. We cannot do so again, and we cannot deprive the owners of the injured oyster beds of their right to compel the defendants to cease from violating both the general rights of the plaintiffs, and the special provisions of the defendants' own Act of Parliament.

I agree that we cannot give the costs of the intervenient trustees to them in consequence of the late stage at which they have intervened, and of their intervention having been the cause of the breakdown in the arbitration for compensation, and also because they, in a measure, represent the original plaintiff. We cannot give him any costs of the appeal, because he is, at least equally with the appellants, responsible for the abortive arbitration, which involved far the greater part of the costs incurred since the case came into this Court.

WALKER, L. J. :—

I concur. I must say that I share in the regret that it was not till the last moment that Mr. Woodhouse invoked the intervention of the trustees in the proceedings. The trustees will have no power to give up these rights under the decree, or accept money. The Vice-Chancellor delivered judgment on the case and pleadings before him, and he exercised his discretion by granting a mandatory injunction. That is subject to review, and similar decisions have been reviewed in several injunction cases. But ought we to overrule his decision? Only two grounds have been put forward as to why we should do so—(1) Acquiescence, and (2) The impossibility of carrying out the decree.

First as to the acquiescence—The lying-by, which has taken place, has not been shown to have imposed any greater burden on the defendants, and I agree with Mr. Meredith that quiescence is not acquiescence. Notice was given, and all they say is that Mussen took no further proceedings. This is not only a case of trespass on another man's property, wilful and reckless, but it is a case in which the defendants derived their powers from an Act of Parliament which they obtained, and which defines the rights of this gentleman under their statute. The defendants must be taken to have known the limits of deviation, and what was covered by the license to lay down oysters which the plaintiff possessed. The knowledge is

derivable from the charter under which they are acting. Is there any impossibility in setting matters right? All that Mr. Barton says is that 15,000 cubic yards of stuff were put on the place, and that it will cost £1500 to put it right. It is only a question of money from Mr. Barton's point of view. We cannot regard that, where the trespass was wilful and reckless, and the persons who committed the trespass derive their powers from an Act of Parliament which contains a solemn parliamentary contract not to do the very thing they have done. I therefore agree with the other members of the Court.

HOLMES, L.J. :—

The defendants were bound by a statute that conferred on them important rights, to protect so much of the Omeath Oyster Beds in Carlingford Lough, for which a license had been granted by the Board of Trade, as were outside the limits of deviation of the defendants' undertaking. Instead of affording such protection, the defendants deposited large quantities of ballast, mud, stones, and general rubbish on part of the beds that were within the legislative contract; and they did this for their own convenience, and to save money. Under such circumstances where the wrong is not denied, where a violation of the statutory obligation is admitted, it would be waste of time to discuss whether the appropriate remedy is not a mandatory injunction directing the defendants to remove the deposit, and to restore the oyster beds to their former condition. It is clear that it is; and it rests upon the defendants to show some grounds for substituting for the usual relief an assessment of damages. The principal matter relied on is acquiescence—not such acquiescence as would be an answer to the action, but such as would modify the judgment of the Court in the way indicated. Now, I doubt if there is any authority for holding that there can be acquiescence of this nature —that is, acquiescence which, without amounting to a defence, would, of itself and in the absence of something more, afford good ground for withholding an injunction.

It is unnecessary however for me to decide this, as I am clearly of opinion that in this case there is no acquiescence of any

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kind. So far from Mr. Woodhouse acquiescing, he warned the defendants more than once, when the work was going on, of the consequences of infringing his rights. He was not bound to commence an action within a month or a year. I am unable to find evidence that the position of the defendants has been in any way prejudiced by the delay. They have enjoyed the advantage of their wrong-doing for a longer period, and that is the only difference that time has made.

The plea of acquiescence having failed, the defendants urge that the injunction will be of little advantage to the plaintiffs, and that the cost and trouble which it will impose on the defendants will be out of all proportion to any benefit that will follow from it. In this I am disposed to agree; but it is no legal ground for refusing the relief asked. If it were, persons in the position of the defendants would be able to acquire rights of property by wrong-doing, and to carry out a compulsory purchase not only without, but in opposition to, statutory authority. There remains the allegation that it would be impossible to obey the injunction. This I think would be a reason for substituting damages for the other remedy, as a Court of Justice ought not to order an impossibility. But there is no evidence that the terms of the judgment cannot be complied with. Of course in one point of view the foreshore cannot be restored to the precise state in which it was before the acts complained of. The surface will necessarily be a different surface; and if the parties are not reasonable there may ensue much unprofitable discussion and perhaps litigation. But the evidence shows that substantial compliance with the order involves nothing more than a certain amount of expenditure.

I wish to say a word as to the costs, which will not follow the rule in ordinary cases. The circumstances of the present appeal are very exceptional. If it had proceeded in the usual way with the result now announced, Mr. Woodhouse would have been awarded his costs of appeal as a matter of course. But before much expense was gone to, he consented to accept damages in money; and the defendants have been obliged to incur great expenditure in having the damages assessed. I hold Mr. Woodhouse responsible for the abortive result of those proceedings; and if he had continued to be the only plaintiff, this would have been a

good ground for refusing him his costs. At the last moment the trustees, knowing all the circumstances, have asked and been allowed to take his place. His responsibilities and infirmities attach to them; and hence the order that they must abide their own costs.

Solicitor for the plaintiffs: *H. R. Emerson.*
Solicitor for the defendants: *Alexander Gartlan.*

R. D. M.

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## IN RE LAVENDER'S POLICY (1).

*Appeal.* 1897. Nov. 3, 4.

*Husband and wife—Separate estate—Restraint on anticipation—Policy of insurance effected by wife on life of husband—Tontine—Condition indorsed restraining assignment.*

A married woman effected, in 1885, an insurance on the life of her husband for a period of ten years, and, under the policy, described in margin as "Wife's policy—Endowment," the amount insured was made payable to her for her sole use, if she and her husband both survived that period (which event happened). The policy was made on condition that certain provisions and requirements annexed to it were to be taken as part of the contract. One of these was "This policy is not assignable":—

*Held*, that there was a restraint upon anticipation, and that an attempted charge upon the policy during the currency of the ten years was void.

ON the 26th May, 1885, Margaret Lavender insured the life of her husband William Lavender, of Ballymena, in the county of Antrim, for a period of ten years from the 13th May, 1885, with the New York Insurance Company, for the sum of £1000, by a tontine investment policy, described in margin as "wife's policy endowment." The annual premium was £107 13*s.*, and the Company covenanted to pay the amount of the policy to the assured for her sole use if living, in conformity with the statute, and if not living, to the children of the person assured, or their guardian, or if the person whose life was insured should survive the

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L. JJ.

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ten years, the sum insured should be paid to Margaret Lavender, or her legal representative. The policy was issued on the condition that certain provisions and requirements annexed to the policy should be taken as part of the contract. These were, amongst others, as follows:—The policy was issued on the Company's tontine investment plan, the particulars of which were as follows:—That the tontine dividend period should be completed on the 13th May, 1895. That no dividend should be allowed on the policy unless the said William John Lavender should survive until completion of the tontine dividend period, and the policy should then be in force, and that the surplus of profits derived from such policies on the tontine investment plan as should not be in force at the date of the completion of their respective tontine dividend periods should be apportioned among such policies as should complete their tontine dividend periods. That after the completion of the tontine dividend period the insured should have the right of selection of one of the several benefits following:—(1) To apply the accumulated dividends to the purchase of an annuity on the said person whose life was insured; (2) To continue the policy for the original amount, and withdraw the accumulated surplus apportioned by the Company to the policy in cash; (3) To withdraw in cash the sum of £1000, and the accumulated surplus. After numerous conditions not material to the present case, there were at foot of the provisions and requirements these words: "This policy is not assignable."

In the year 1892 William J. Lavender, with the assent of his wife, deposited the policy by way of equitable mortgage with Messrs Douglas & Co., of No. 47, Queen-street, Belfast, and Mr. Thomas Moore of same place as security for moneys due by him to them.

In 1893 Lavender became involved in financial difficulties, and he informed Douglas & Co., and Thomas Moore, to whom he was then indebted in the sum of £879, that if anything further were required to perfect their title to the policy, he and his wife would sign whatever was necessary. The following letter was then prepared by Douglas & Co., and was, on the 4th June, 1893, signed on Mrs. Lavender's behalf, and by her authority, by her daughter.

"*To* MESSRS. DOUGLAS & Co., 47, Queen-street,
and THOMAS MOORE, Jun., Esq.

"GENTLEMEN,—I acknowledge that the policy for £1000, No. 205,136, dated 26th May, 1885, on my husband's life with the New York Life Insurance Co. was deposited with you on my behalf, as security for all moneys which my husband might from time to time owe you, and you are to retain said policy until such moneys are paid. Meantime you have a lien on all moneys which may become payable under the policy, and I shall do whatever is necessary to enable you to be paid out of the first moneys payable under said policy.

"M. M. LAVENDER."

Notice of the deposit was given to the Insurance Company on the 18th April, 1894.

By deed dated the 2nd June, 1894, Douglas & Co. assigned to the Ulster Bank their interest in the policy as security for all moneys they might owe to the bank, and notice of this assignment was given to the Company on the 13th February, 1895. Moore was subsequently adjudicated bankrupt. The policy became payable on the 13th May, 1895, when £1236 5*s.* 5*d.* was payable under it. Mr. and Mrs. Lavender were then both alive, and they had five children. As the title to the amount payable in respect of the policy was disputed, the Insurance Company brought it into Court on the 23rd February, 1897, under the provisions of the Life Insurance (Payment into Court) Act, 1896. In July, 1897, the Ulster Bank served notice for payment to them of £879 out of the amount; the assignees in the bankruptcy of Moore served notice for payment to them of £369; and Mrs. Lavender served notice for payment to her of the entire amount lodged by the Insurance Company. On the 6th July, 1897, the Master of the Rolls gave judgment, and decided in favour of the Ulster Bank and the assignees of Moore, and against Mrs. Lavender. From that order Mrs. Lavender appealed.

*Cooke, Q.C.* (with him *Ronan, Q.C.*), for the appellant:—

Under section 11 of the Married Women's Property Act, 1882, this policy was the separate property of Mrs. Lavender: and a restraint on anticipation might be annexed to it: *In re Lumley; Ex parte Hood Barrs* (1); see the 19th section of the statute.

(1) [1896] 2 Ch. 690.

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Independently of the Act of 1882, the words of the policy were sufficient to create separate estate: *Steedman* v. *Poole* (1). The condition not to assign imported a restraint on anticipation: *Harrison* v. *Harrison* (2). Admitting that the money when payable would be free from the restraint on anticipation, that would not be separate estate which the married woman could bind in anticipation by contract: *In re Shakespear; Deakin* v. *Lakin* (3).

*Carton, Q.C.* (with him *S. L. Brown*), for the assignees of Moore, and *Meredith, Q.C.* (with him *Hume*), for the Ulster Bank:

The word "sole" is not of itself sufficient to create a separate estate in the wife: *Massy* v. *Rowen* (4), affirming the decision of the Court of Appeal in Chancery in this country, *Massy* v. *Hayes* (5). It at all events was never contemplated that at the expiration of the ten years the money payable on foot of the policy should be impressed with an inalienable trust for the insurer's separate use. The prohibition to assign was an ordinary condition introduced solely for the convenience of the Company. What is there to render invalid an equitable charge such as there is here?

*Ronan, Q.C.*, in reply, cited *Heningway* v. *Braithwaite* (6) (7).

Nov. 4.

LORD ASHBOURNE, C.:—

This is an appeal from an order of the Master of the Rolls in reference to a sum of money lodged by the Insurance Company in Court under a tontine policy effected by Mrs. Lavender on the the life of her husband, William John Lavender, dated the 6th May, 1885, payable at the expiration of ten years, or on the death of the husband. He did live for the period of ten years, which expired in May, 1895, and at that time, the money being payable, the Company instead of paying it to the insured, lodged it in Court in consequence of certain claims, notice of which was served upon them.

(1) 6 Hare, 193.
(2) 13 P. D. 180.
(3) 30 Ch. D. 169.
(4) L. R. 4 H. L. 288.
(5) I. R. 1 Eq. 110.
(6) 61 L. T. (N. S.) 224.

(7) Some other questions raised by the affidavits were argued, but the question as to the restraint upon anticipation was ultimately the only point upon which the Court had to decide.

The question was argued before the Master of the Rolls on notices served by the mortgagees, and on a counter-notice by the wife, claiming that she was entitled to be paid, notwithstanding these charges. The Master of the Rolls decided in favour of the two mortgagees who served the notices. The wife has appealed, and the appeal has been argued before us by Mr. Ronan and Mr. Cooke. Many points have been urged, some of which are of interest and importance, but I confine myself to the point which I think is adequate to decide the matter in controversy, without saying anything on the other points, as to which we might require more information. This policy is a tontine policy made by the Mutual Insurance Company of New York, to insure the sum of £1000, at the end of ten years, provided the husband should so long live, and the premiums were paid, and subject to the conditions endorsed on the policy. This policy is marked in the margin with the words in print—"Wife's Policy," "Endowment Tontine Investment Policy," and its purpose is on the application of the wife to make insurance for £1000, at the premium of £107 13*s.*, and it provided that if the husband died within the ten years the money was to be paid to the wife, for her sole use if living, and if not living to the children of the person whose life was insured, or their guardian, but if the person insured survived the ten years, the money was to be paid to Mrs. Lavender or her legal representatives. It then provided by one of the conditions endorsed, "This policy is not assignable."

The policy was entered into by the parties having regard to what was on the face of it, and to the existing state of the law, which provided that, this being a married woman, it was settled to her separate use. The question argued before us was—whether these words made it not only settled to her separate use, but also had the effect of adding a restraint against anticipation? I am of opinion that it did, and therefore, being amenable to the law as it stood, that it could not be dealt with by her during the currency of the period; in other words, that it was subject to the restraint against alienation during the ten years. That is the only intelligible way of construing this endorsed condition, having regard to the settled law of the country. That being so, we come to this document on which the question turns. It is

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undated. It is marked—"Memo. T. Moore, Junior." [His Lordship read the document, *ante*, p. 177.]

I regard that document, which is signed "M. M. Lavender"—Mrs. Lavender herself was ill, but it was signed by her daughter by her authority—I am taking it that it was signed by her—as simply dealing with the policy; it does not make her personally responsible in respect of her husband's debts. It is a contract to make a charge, or a contract to make an assignment. But as she was restrained from anticipation, in my opinion it cannot be used for any such purpose as an actual assignment or mortgage of the policy.

The proper order to make will be to refer the case back to the Master of the Rolls with a declaration that the policy was subject to a restraint on anticipation, and therefore this assignment cannot be relied on.

The Master of the Rolls can make such order as to the other matters as will be just.

FITZ GIBBON, L.J.:—

I concur. The question to be decided is—Whether this policy being separate property, is subject to a restraint against anticipation? The answer depends upon the effect to be given to the condition endorsed on the policy, which is in these words:—"This policy is not assignable." The ingenuity of counsel has been unable to give any effect to that condition unless it operates as a restraint on anticipation. We have a precedent in the effect given to the words "not transferable" endorsed upon a deposit receipt; and, in addition, we have here, on the face of the policy, words which indicate that it was intended as a provision to which the restraint would naturally be attached. It is headed "Wife's Policy," and described as "Endowment Tontine Investment Policy," and, subject to the payment of the premiums, the wife is to get her "endowment" after ten years increased by profits; or, if it becomes payable sooner, the amount is not to be increased by profits. In every event the payment is deferred, and anticipation is inconsistent with the object of the transaction. A policy in this form might be effected either by husband or by wife. Let us take both cases. A wife, living with her husband, has some

money; if she insured his life, she could do so by law, and could restrain anticipation, subject always to the Married Women's Property Act, 1882, sect. 19. The case would not be affected by that section, unless there were debts contracted before marriage. But take the other case; suppose the husband effected the policy, his most likely and natural object would be to make a provision for his wife and children in the event of his death. It would defeat that object if he enabled the wife to alienate, or to anticipate the provision. It would be natural to make the sum payable when the husband died, and not sooner. Therefore, construing the condition upon the principle *ut res magis valeat quam pereat*, it amounts to a restraint on anticipation. The form of the order requires care, owing to the alternatives offered by the policy. We shall declare that on the true construction of the policy, Margaret Lavender, the wife of the insured, was restrained from anticipation during the currency of the policy, and that the memorandum of charge relied on by the respondents was, and is, inoperative to charge the moneys payable under the policy. The policy and all moneys payable thereunder must be declared to be the separate property of Margaret Lavender, and we shall remit her application to the Master of the Rolls, to proceed thereon as to justice shall appertain.

Mrs. Lavender will have to elect as between the two rights of payment under the policy, and further she will have to show that the title which accrued to her in 1895 is still in her, and that she has a present right to receive the money payable under the policy. It appears to me to be now in the position of an overdue gale of an annuity, or of a jointure. No restraint on anticipation can continue to exist after a present absolute right to receive payment of the *corpus* has accrued. The provision operated to restrain the wife from anticipating payment during ten years from the making of the policy, but when that period was over, the policy was her separate property, and at her disposal.

WALKER, L.J.:—

I concur, and for the reasons given by the Lord Chancellor, and by Fitz Gibbon, L.J. The claim of Mr. Carton and Mr. Meredith's clients is based on the hypothesis that the title of this

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lady to this policy is founded on the assumption of the application of the Married Women's Property Act. It is settled that a restraint on anticipation can be validly attached to a gift to a married woman *simpliciter* where by the Married Women's Property Acts it is made separate property. The only question is—Is this effected by the contract of assurance in this case? It is sufficient, in the case of separate property of a married woman, to create a restraint on anticipation, if the words used are "That she shall not assign."

There is nothing unreasonable in holding it inalienable. If the policy were one within section 10 of the Act of 1870, or section 11 of the Act of 1882, it would be quite reasonable that it should be inalienable, and this policy was a wife's endowment policy, and if there had followed in the body of the policy the words "but so that it shall not be assigned till payable to her," there would be an end of the case. The question is whether—as a matter of construction—words to the same effect are not to be read into it.

The endorsed conditions are to be accepted by the insured as fully as if contained in the body of the document, and these words are equivalent to this—the contract of insurance created by this policy shall not be assigned by the insured.

The question on the 19th sect. of the Act of 1882 is given up. Then, when was this money payable? When was it freed from the fetter against alienation? When the ten years were out. That was in May, 1895; and this lady would then be entitled to payment of the amount, subject to any debts created by her since then.

HOLMES, L.J.:—

The policy of insurance is described in the margin as "Wife's Policy—Endowment." At the place where it is signed by Mrs. Lavender, it is stated that it is effected for her benefit; she becomes absolutely entitled to the moneys payable under it if her husband survives for ten years, or if he dies during the ten years in her lifetime; and although in certain unlikely contingencies her husband or children take interests, it was from the moment of its execution her sole property, increasing in value daily.

In construing a document of this kind, regard must be had to the state of the law at the time it came into existence, and it is admitted that although the insurers are an American Company, the law of England is to be looked at. In this connexion the following matters are noteworthy—1, by the 5th section of the "Married Woman's Property Act, 1882," the policy became from the first the separate property of Mrs. Lavender; 2, a stipulation that property, given absolutely to a man, shall not be assigned by him is void; 3, a similar stipulation attached to property, given to a woman for her separate use, is operative during her coverture; and 4, such a stipulation may be attached not only where the property is made the woman's separate estate by contract or the declaration of the donor, but also, where it becomes so by operation of the statute: *In re Lumley*; *Ex parte Hood Barrs* (1). A policy of life assurance is, as Mr. Carton says, only a contract. So too are marriage articles; and indeed the description Endowment, as well as the contingent interests given to the husband and children, seems to make this policy closely akin to a post-nuptial settlement. The conditions endorsed are incorporated with and form part of the instrument; and one of them provides that the policy is not assignable. This must mean assignable by Mrs. Lavender, as she is the only person who would be entitled to assign it. The sole question for our decision is the effect of this provision. Taken in connexion with the fact that the policy is the separate property of the wife, it constitutes, according to the argument of her counsel, a valid restraint on anticipation. Can any other meaning be given to it? Such a condition is unusual in life policies. It would be wholly inoperative in a policy issued to a man, or to an unmarried woman, at least as long as she continues so. In the case of a wife who takes the policy as separate property, it is legal and appropriate. Mr. Meredith says that it is one of several conditions introduced in a tontine policy for the convenience of the Insurance Company. But it could only be convenient, if it were effective; and it can only be effective as preventing a married woman from parting with her separate estate. I therefore concur in the judgment of the Court. I also agree

(1) [1896] 2 Ch. 690.

*Appeal.* 1897.

*In re* LAVENDER'S POLICY.

Holmes, L.J.

with Lord Justice Fitz Gibbon, that the restraint only continues until the money becomes payable. Mrs. Lavender is prevented from assigning the policy; but it is provided that at the stipulated periods she is entitled to receive the amount insured, which she is then at liberty to dispose of as she pleases. It is in this respect analogous to the case of income, given for the separate use of a married woman with restraint on anticipation. She cannot assign it before it becomes due; but once it is payable to her, the restraint is gone.

Solicitor for Mrs. Lavender: *William Wilson.*

Solicitors for the New York Insurance Company: *D. & T. Fitz-Gerald.*

Solicitors for the Ulster Bank: *Carson & M'Dowell.*

Solicitor for the assignees of Moore: *H. C. Neilson.*

R. D. M.

## In the MATTER of the ESTATE of GEORGE W. BENNETT, Owner; MUNSTER AND LEINSTER BANK, Limited, Petitioners.

*Kenny, J.*
1898.
Feb. 7, 15.

*Voluntary settlement—Construction of deed—Rentcharge, or half rents and profits—Executed trust—Equitable estate in fee—Words of limitation.*

By a voluntary settlement, executed in 1870, lands held in fee-farm were conveyed to trustees and their heirs in trust, after the death of the settlor, to pay his wife out of the rents and profits a clear annuity of £100 for her life, and to apply the balance for the maintenance of the settlor's children during their minority. In case the settlor's eldest son T. should die or marry without prescribed consent before attaining twenty-one years, his share of the lands was to go to the younger son G.; and it was provided that after the death of the settlor's wife "her £100 a-year, or half the rents and profits of" the lands should be paid to G. On G.'s death, or marriage without consent under twenty-one, his "share and proportion of" the lands was to go to T.; and if both sons died or married without consent under twenty-one, the lands were to belong to the settlor's daughters, their heirs and assigns, as tenants in common:—

*Held*, (1) that G. was entitled to a rentcharge of £100 a-year in any event, with the superadded right of taking half the rents and profits whenever the rental exceeded £200 a-year; (2) that G. took an estate for life only in the rentcharge.

Motion on behalf of the petitioners to amend the conditional order for sale by directing *inter alia* that an annuity or yearly rentcharge of £100, issuing and payable out of the lands of Ballyneety, in the baronyof Coonagh, and county of Limerick, or if the rents and profits of the said lands exceed £200 a-year, then an annuity or yearly rentcharge equal in amount to one moiety of such rents and profits, be sold. The petitioners were mortgagees of the estate and interest which George W. Bennett, the younger son of Samuel Bennett, took under a postnuptial settlement, or voluntary deed, dated the 6th August, 1870, and made between the said Samuel Bennett of the one part, and Thomas Turnell Bennett and George Bennett, trustees, of the other part.

*Kenny, J.*
1898.

*In re* BENNETT'S ESTATE.

The notice of motion was served by direction of Ross, J., for the purpose of determining a question of construction upon this deed. By the deed a clear annuity of £100 a-year charged on the lands of Ballyneety was given after the settlor's death to his wife Emma Bennett, for her life, and after certain events which happened the deed provided that "her £100 a-year, or half the rents and profits of the said townland of Ballyneety should be paid to the said George Bennett" (the owner in the matter). The other material clauses of the deed are sufficiently stated in the judgment of Kenny, J., who heard the motion in the unavoidable absence of Ross, J.

A cross notice was served on behalf of Mrs. Jane Bennett, the owner of the lands charged, seeking a declaration that, inasmuch as there were no words of inheritance annexed to the limitation of the yearly rentcharge, George W. Bennett was entitled to it for his life only.

*O'Connor, Q.C.* (with him *D. F. Browne*), for the petitioners:

Two questions are raised by the notices of motion. First, as to the amount of the annuity; secondly, as to its duration. By the deed of the 6th August, 1870, the whole estate in the lands of Ballyneety was given to the trustees. The legal estate was vested in them, because, immediately upon the death of the settlor, active duties were imposed upon them. No share in the lands was expressly given by the deed to Thomas Bennett, who was the eldest son and heir-at-law of the settlor, and upon whom, of course, in that character any undisposed of interest would devolve. After the death of the settlor's widow, Emma Bennett, "her £100 a-year, or half the rents and profits of the said townland of Ballyneety, shall be paid to the said George Bennett on his attaining the age of twenty-one years." What is the meaning of these words? There are only three possible constructions—First, that George Bennett was to get a fixed unalterable sum of £100 a-year; secondly, that he was to get £100 a-year if the rents and profits were sufficient—but if they fell short, then only half the rents and profits; thirdly, £100 a-year, but if half the rents and profits exceeded that sum, then half the actual rents and profits. The first construction is inadmissible, because if that were the

settlor's meaning there would have been no use in superadding the alternative. To ascertain whether the second or third construction is the true one, the context must be called in aid. The annuity is first mentioned in the gift to the wife. It is there described as "a clear annuity of £100 a-year." The annuity given to George is "her £100 a-year." That supports our contention that the third construction is to be adopted. But suppose the meaning obscure, then the grantee is entitled to take in the way most favourable to him: Elphinstone on Deeds, p. 100, Rule 22, citing Shep. Touch., 83. But if the patent ambiguity cannot be removed, the clause is void for uncertainty, subject to the one exception that it may be determined by the election of the parties. Half of the rents and profits are in fact much less than £100 a-year, so that it would be sufficient for the petitioner to establish that the annuity was at least £100 a-year clear and without liability to diminution. The gift over on the death of Thomas and George under the age of twenty-one, or unmarried, shows that the settlor thought he was dealing with the whole estate, that he had exhausted it all. The *corpus* of the property was dedicated to the creation of an annuity first given for life, and afterwards treated as continuing.

Then as to duration, this is a perpetual annuity: *Stokes* v. *Heron* (1). These are equitable interests, and the cases on wills apply. The deed itself is testamentary in its character. Words of limitation are unnecessary. We have only to ascertain what was the intention of the settlor. Presumably the trusts exhaust the whole of the legal estate in the trustees: see *per* May, C.J., in *Lysaght* v. *Magrath* (2), where he says:—"In dealing with which description of estate (*i.e.* merely equitable interests) it has been laid down by several writers of authority that words of inheritance are not necessary in order to convey an estate in fee," and he refers to Butler's Co. Litt., 290 *b*, xvi.; 1 Sanders on Uses, 342. In the same case Deasy, L.J., says, at p. 169:—"An equitable fee may be created without the word 'heirs,' and an equitable entail without the words 'heirs of the body,' provided words be used which, though not technical, are popularly equivalent, or the intention

(1) 12 Cl. & Fin. 161. (2) 11 L. R. Ir. 142, at p. 156.

*Kenny, J.* 1898. *In re* BENNETT'S ESTATE.

otherwise sufficiently appears on the face of the instrument," citing as an authority 2 Preston on Estates, where the author says:—"A conveyance to A and his heirs in trust for B in fee would pass a fee." This is a deed of a testamentary character, similar in that respect to the instrument with which the Court of Appeal were dealing in *Lysaght* v. *Magrath* (1). The Vice-Chancellor in giving judgment in *Meyler* v. *Meyler* (2), where he held words of limitation necessary, does not refer to the views expressed by May, C.J., and Deasy, L.J., in *Lysaght* v. *Magrath* (1).

*Ronan, Q.C.*, for Mrs. Bennett:—

The second point is closed by authority. The passages cited from the judgments in *Lysaght* v. *Magrath* (1), in which the question did not arise, are mere *dicta*.

In the case where the question did arise (*Meyler* v. *Meyler* (2)), the Vice-Chancellor decided that to create an equitable estate in fee, in a case like the present, to which the Conveyancing Act does not apply, words of limitation are just as necessary as in a legal estate in fee. That case was followed by Lord Justice Chitty in the latest reported English decision on the subject: *In re Whiston's Settlement* (3). The rule is stated in Elphinstone on Deeds, p. 224 (Rule 67), to which there are nine exceptions, equitable estates not being amongst them. Again at p. 232, Sir Howard Elphinstone says, "The use of the word 'heirs' is (in deeds prior to 1882) absolutely necessary." In the witnessing clause the lands, which were held in fee-farm, are conveyed to the trustees to hold to them and the survivor and the heirs of the survivor. The legal estate passed to Samuel Bennett, for there is no limitation to the use of the trustees. Active trusts will not give the legal estate to trustees in violation of express limitations. In the ultimate limitation the daughters take the fee. The nature of an annuity of this kind is explained by Lord Hardwicke in *Savery* v. *Dyer* (4). See also 3 P. W. 263, note D to report of *Low* v. *Burron*; "It is observable that at law there can be no general

(1) 11 L. R. Ir. 142.
(2) 11 L. R. Ir. 522.
(3) [1894] 1 Ch. 661.
(4) 1 Ambl. 139.

occupant of a rent": *In re Gillman's Estate* (1); Harrison on Chief Rents; *Taylor* v. *Martindale* (2); *Parsons* v. *Parsons* (3); *Ramsay* v. *Thorngate* (4); *Joynt* v. *Richards* (5); *Martin* v. *Haynes* (6).

This is simply the case of an annuity or rentcharge issuing out of lands held in fee-farm, and no authority can be produced in which such an annuity has been held to be more than an annuity for life.

The other point is very simple. "In case of his [Thomas'] death, his share is to go to the second son." Is there not a necessary implication that Thomas had a share to go over? Thomas' share was the whole, less George's. The share of George was £100 a-year or half the rents and profits if less. Any other construction would enrich the younger son at the expense of the elder.

*D. F. Browne*, in reply:—

The wife was to have £100 a-year clear, and "her" annuity is given to George Bennett. Therefore the minimum measure of his right is £100 a-year. Active duties were imposed on the trustees which it would have been impossible for them to perform unless they took the legal estate. *Gillman's Estate* (1) was the case of a legal rentcharge issuing out of real estate as well as chattels real; the only question raised being whether it could have a more extended duration *quoad* the chattels real.

KENNY, J.:—

Feb. 15.

The petitioners in this matter ask for a sale of an annuity of £100 issuing out of the rents and profits of the lands mentioned in the second part of the first schedule, these being the lands of Ballyneety, held under fee-farm grant dated the 7th February, 1859, or in the alternative for the sale of an annuity equal to one-half of the said rents and profits. On that petition a conditional order was made on the 29th November, 1897, for the sale of the annuity of £100 a-year, or "an annuity or yearly rentcharge

(1) I. R. 10 Eq. 92.
(2) 12 Sim. 158.
(3) L. R. 8 Eq. 260.
(4) 16 Sim. 575.
(5) 11 L. R. Ir. 278.
(6) 29 L. R. Ir. 416.

*Kenny, J.* 1898.

*In re* BENNETT'S ESTATE.

equal in amount to one moiety of the rents and profits of the said lands for each and every year in which one moiety of such rents and profits shall prove insufficient for payment of the entire of said annuity of £100."

On that conditional order being made, the petitioners contended that, on the true construction of the deed of the 6th August, 1870, which created this annuity, George W. Bennett, the mortgagor, was entitled to receive out of the rents and profits of the lands of Ballyneety an annuity of £100 as long as the rents and profits were sufficient to yield £100 a-year, and that in every year in which the rents and profits should exceed £200 a-year the said George W. Bennett should receive one-half of the said rents and profits of the said lands for such year in lieu of the said annuity of £100. It was a claim therefore that George W. Bennett was entitled to £100 in any year that the rents and profits produced £100, and that in any year in which they exceeded £200 he was entitled to one-half of the surplus over that amount. That contention having been made, Mr. Justice Ross directed that a special notice should be served asking that the conditional order might be varied in accordance with the petitioners' contention; and accordingly the notice of motion before me was served. [His Lordship read the notice of motion.] On that notice being served a cross notice was served on behalf of Mrs. Jane Bennett, in whom apparently is vested the interest of Thomas Bennett, named in the deed of the 6th August, 1870, and who would be the person interested in cutting down the annuity. This is the cross notice—[His Lordship read it]. On the two notices two questions arise: first, as to the *quantum* of the annuity; and, secondly, as to its duration. The deed of 1870 which has given rise to this controversy is a deed of the most inartificial character. It is made between Samuel Bennett of the one part and Thomas Turnell Bennett and George Bennett (described as "trustees herein") of the other part; and there is no doubt that it is a voluntary deed, and, as contended by Mr. O'Connor, obviously testamentary in its character. By that deed Samuel Bennett, being entitled under a fee-farm grant, executed under the provisions of the Renewable Leasehold Conversion Act prior to this deed of 1870, conveyed to Thomas Turnell Bennett and George

Bennett the townland of Ballyneety, to hold to the said Thomas Turnell Bennett and George Bennett, and the survivor of them, and the heirs and assigns of such survivor, for the use and benefit of the said Samuel Bennett, the settlor for his life. Well, so far there is no doubt that these two gentlemen, called trustees, were really releasees to uses, and that Samuel Bennett took the first legal estate for his life. The deed proceeds, "And after his death then in trust, and upon the conditions, uses, and purposes following—that is to say, out of the rents thereof to pay to his beloved wife Emma Bennett one clear annuity of £100 sterling for and during her natural life . . . and after payment of same to pay the balance of the rents and profits arising from said townland to his wife Emma Bennett towards the support, maintenance, clothing, and education of his said children, until his son Thomas should attain twenty-one years of age." Now, from the death of Samuel Bennett it is evident to me that active duties were imposed on these persons who were releasees to uses in the first instance. They were to pay Mrs. Bennett £100 a-year for her life, and also the residue of the rents and profits, to be applied towards the maintenance of the children until the eldest son Thomas should attain twenty-one years of age. The deed then continues, "And in case of his [Thomas'] death, or marriage without approbation before attaining that age, then his share or portion of said townland to go to to the second son, the said George Bennett." I cannot follow the argument that the "share or portion" there referred to is the share that Thomas as heir-at-law might take. If I were to speculate I should infer that the draftsman omitted a direct grant to Thomas, and that Thomas was intended to take a share of the lands expressly under the deed. Then follow these words:—"And after the death of the said Emma Bennett then her £100 a-year or half the rents and profits of the said townland of Ballyneety shall be paid to the said George Bennett on his attaining his age of twenty-one years; and in case of his death or marriage without said approbation before that age then his share and proportion of the said townland shall go to the eldest son, the said Thomas Bennett." The whole of the argument in the case ranges round this clause. It creates a perfectly new annuity on the death of Emma Bennett, although the deed describes it as "her" annuity,

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and the grant in favour of George is unaccompanied by any words of limitation.

Regarded from a conveyancer's point of view, the phraseology of this deed throughout is of a singular character; and its construction, so far as the *quantum* of the annuity is concerned, must be a matter of little more than guess work. Having given his wife an annuity of £100, charged on the lands and limited in the most express manner for the duration of her life, the grantor deals with it in the passage which is the subject of controversy as if it still had existence after her death, for he refers to it as "*her* £100 a-year." If the words which immediately follow this description were omitted I would come to the conclusion that, though no annuity extending beyond the wife's life had been theretofore created, another annuity of £100 sprung into existence on her death, and that it bore the same characteristics as hers, and was consequently a first charge on the lands, but subject to no increase or diminution so long as the rental exceeded £100 a-year. The petitioners contend that the effect of the subsequent words, "or half the rents and profits," is to vest in the grantee a right to £100 a-year so long as the whole rental is adequate to pay it, and to entitle him also to a moiety of the surplus rental over and above £200 a-year. In other words, that the grantee is in any event to take as a first charge £100 a-year, with a possibility of an increase thereto when the rental exceeded £200. Considerable importance was attached by the petitioners to the word "her," as indicating that the annuity was *prima facie* to occupy the same position in relation to the lands that Mrs. Bennett's did, and it was urged that the words following had not the effect of cutting down, but, on the contrary, of enlarging the grantee's rights. I am not at liberty to speculate as to what were the notions of the grantor with regard to the rental of his estate, but I must place some meaning on the words "or half the rents and profits." If, as Mrs. Jane Bennett contends, at no time and under no circumstances was George Bennett to take more than half the rental, why were the words "her £100 a-year" inserted? I am forced to the conclusion that the expressions used show that the grantee was to have £100 a-year in any event, just as the grantor's wife had, with the superadded right of taking half the rents in lieu thereof, whenever the

rental exceeded £200 a-year. If I determined otherwise, I would be placing a restrictive and limited meaning on the words "or half the rents and profits," which I do not consider myself warranted in doing in the absence of clear expressions indicating the intention to cut down the annuity. I therefore hold that these words have an enlarging and not a limiting effect, and that so far as the amount of the rentcharge is concerned, the petitioners are entitled to succeed in their application to vary the conditional order.

But, on the other question, I am of opinion that George W. Bennett took, under the deed of 1870, merely an estate for his own life in the rentcharge. The lands are held under a fee-farm grant executed pursuant to the Renewable Leasehold Conversion Act, and previously to the deed of 1870, and by the latter deed they are conveyed to releasees to uses, to the use of the grantor for life, and after his death in trust to pay his widow an annuity of £100 during her life, and after her death, "then her £100 a-year, or half the rents and profits shall be paid to the said George W. Bennett on his attaining the age of twenty-one years." It is clear to my mind, that on the death of the settlor active duties are imposed on the releasees, namely, the payment not only of a rentcharge to the widow during her life, but also of another rentcharge to George W. Bennett on attaining twenty-one; and though, in the view I take, I do not regard the point as a very important one, I think that they take the legal estate while these active trusts continue in existence, but no longer. These trusts would, in my opinion, certainly have determined, if George had died before attaining twenty-one, in which latter event the use would have become executed in Thomas Bennett, if he were then living, or, in certain other events, in the settlor's daughters. The releasees to uses not having, in my opinion, the whole legal fee-simple vested in them, I do not think that the *dicta* of certain eminent text-writers apply, which lay down that if a fee-simple estate be limited unto and to the use of grantees and their heirs, in trust for A B, without the addition of any words of limitation, A B takes an equitable estate in fee, because the trustees who hold for him got the whole legal fee. It was argued that here, in the event of George W. Bennett attaining twenty-one, the releasees would take the whole legal fee, because

*Kenny, J.* 1898. *In re* BENNETT'S ESTATE.

George Bennett would take the whole equitable interest; but such a contention really begs the question of the *quantum* of estate that George was intended to take. The case is thus left at large.

Several authorities were cited by Mr. O'Connor; but with the exception of *Lysaght* v. *M'Grath* (1) they were all cases of wills in which the question of intention was the governing consideration, and which cannot, in my opinion, rule the present case. In *Lysaght* v. *M'Grath* (1), which was the case of a deed, the limitation was "to B absolutely," but it was not necessary to decide what estate was thereby conferred on B, and there was no decision on the question. No doubt Chief Justice May, at p. 156, and Lord Justice Deasy, at p. 169, both eminent real property lawyers, refer to the opinions of text-writers that words of limitation are not absolutely necessary for conferring by deed an equitable estate in fee but Chief Justice May offers no opinion of his own, while he does say that in the case of executed trusts—which the trusts in this case are—conveyancers deal with them as they would with legal estates. The leaning of Lord Justice Deasy's mind was clearly in the direction of the text writers' opinions, but he expressly guarded himself against being understood to decide the point. Had he held that in that case the word "absolutely" took the place of words of limitation, it would have been no authority in the present case where there is no corresponding expression. The passage cited by Lord Justice Deasy, at p. 168, from Lewin on Trusts, must, I think, if applicable, be confined to cases either of purely executory trusts, when the assistance of a Court of Equity might be deemed necessary to carry out the intention of the parties, and to cases where words are used which, in popular acceptation, would be equivalent to the word "heirs." Thus in 2 Preston on Estates, p. 64, it is said that "a conveyance to A and his heirs in trust, *totidem verbis*, for B in fee, would pass a fee, so there may be a right in equity to call for a conveyance of the fee because there is evidence of an intention to convey the fee, although that intention be not expressed by a limitation to heirs." Here there are no popular expressions equivalent to words of limitation, and although the instrument bears internal

(1) 11 L. R. Ir. 142.

evidence of its being of a testamentary character, I can find no sufficient evidence of an intention to confer more than a life estate on George Bennett.

I therefore consider I have to deal with a case in which, putting it most strongly for the petitioners, the grant is substantially one "unto and to the use of A and his heirs in trust for B, on attaining twenty-one." In the light of judicial authority, the construction of such a grant presents no difficulty. It is dealt with in the last edition of Lewin on Trusts, p. 109: *Holliday* v. *Overton* (1); *Lucas* v. *Brandreth* (2); *Tatham* v. *Vernon* (3) (where the question of executory trusts was discussed); *Middleton* v. *Barker* (4); *Meyler* v. *Meyler* (5); and finally, *Re Whiston's Settlement* (6). This somewhat long line of authority in my opinion leaves no opening for doubt, so far at least as a Court of first instance is concerned, that in dealing with equitable interests when the trusts are executed the same rules of construction must be invoked as in cases of legal limitations. I am, therefore, of opinion that George W. Bennett took, under the deed of 1870, merely a life estate.

The conditional order for sale will be amended by confining it to the life estate of George W. Bennett in an annuity of £100, charged on the lands in question, or in half the rents and profits of the lands in case the same should exceed £200 a year.

The costs of Mr. Ronan's client must be paid by the petitioners, who will have them together with their own costs of this argument as part of their costs in the matter.

Solicitor for the petitioners: *William F. O'Shaughnessy.*
Solicitor for Mrs. Bennett: *William Leahy.*

W. G.

(1) 14 Beav. 467.
(2) 28 Beav. 274.
(3) 29 Beav. 604.
(4) W. N., 1873, 231.
(5) 11 L. R. Ir. 522.
(6) [1894] 1 Ch. 661.

*V.-C.*
1896.
Dec. 8.

## BUTTERLY *v.* CUMING.

(1895. No. 704.)

*Practice—Judgment for sale of mortgaged premises—Difficulty in identifying same—Order for attendance and examination of defendant—Order XLII., Rule* 36.

The judgment in a mortgagee's suit having directed a sale of the mortgaged premises, difficulties arose in Chambers in identifying the property and preparing a rental, and applications to the defendant for information were not complied with.

The Vice-Chancellor made an order that the defendant should attend to be examined *viva voce* before the Chief Clerk.

Ex parte application on behalf of the plaintiff to the Vice-Chancellor at Chambers for an order that the defendant should attend for examination.

The action was brought to raise the amount of an equitable mortgage, and by judgment, dated the 20th February, 1896, it was ordered that the estate and interest of the defendant in the mortgaged premises should be sold, and that the sale should be retained in the Vice-Chancellor's Court.

Difficulties arose in Chambers as to the identification of portion of the mortgaged premises, and applications to the defendant for particulars, to enable a rental to be prepared, were not complied with. Inquiries from other persons also failed to elicit the necessary information. It was believed that the particulars required were within the defendant's knowledge.

*Donaldson*, in support of the application, referred to Order XLII., Rule 36.

The Vice-Chancellor made an order that the defendant should attend at Chambers on the 14th January, 1897, to be examined *viva voce* before the Chief Clerk in relation to the lands of . . . and that the defendant should bring with him, and produce before the Chief Clerk all title deeds, copies of title deeds, books, maps, rentals, counterparts of tenants' leases or agreements, or copies of said leases or agreements, and documents relating to the said lands and premises.

Solicitor for the plaintiff: *Alfred Henry.* D. M'C. M.

## NATIONAL BANK *v.* KENNEY.

(1897. No. 81.)

*V.-C.* 1898. March 1.

*Receiver appointed by mortgagee—Arrears of interest due at date of appointment—Duty to pay same—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 24 (8) (iv).

A receiver appointed by a mortgagee under the powers conferred by sectio n 19 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), is bound under section 24, sub-section 8 of that Act to pay arrears of interest due to the mortgagee at the time of the appointment, and not merely interest accruing due after that date.

THIS CASE was placed in the Vice-Chancellor's Chamber list on the application of the Employers Liability Assurance Corporation, for the purpose of taking the opinion of the Judge on the question whether the defendant as receiver appointed by the plaintiffs under the powers conferred on mortgagees by section 19 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), was bound, under section 24, sub-section 8 (iv) of that Act (1), to pay arrears of interest due on the plaintiffs' mortgage debt at the time of the receiver's appointment, or only interest accruing due after that date.

The plaintiffs, the National Bank, Limited, were mortgagees

(1) Section 24, sub-section 8, so far as material, is as follows:—

The receiver shall apply all money received by him as follows (namely):

(i) In discharge of all rents . . . . ; and

(ii) In keeping down all annual sums or other payments, and the interest on all principal sums having priority to the mortgage in right whereof he is receiver; and

(iii) In payment of his commission . . . . ; and

(iv) In payment of the interest accruing due in respect of any principal money due under the mortgage;

And shall pay the residue of the money received by him to the person who but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

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of certain hereditaments under a deed dated the 16th November, 1888. On the 29th October, 1891, they, pursuant to section 19 of the Act, appointed the defendant receiver over the mortgaged property, and the Assurance Corporation became sureties to the plaintiffs for the performance of his duties by the defendant. This was an action against the receiver for an account. The Assurance Corporation having obtained liberty to attend the proceedings, made the case on the taking of the accounts in Chambers, that the payments made by the defendant to the plaintiffs exceeded the interest which accrued due on the mortgage debt between the date of the appointment of the receiver and the time at which the Corporation's liability to the plaintiffs was terminated by notice under the contract; and they contended that the defendant's duty was to apply the moneys received by him in payment only of interest accruing due after his appointment, and not of arrears then already due, and that the plaintiffs had accordingly suffered no loss for which the Corporation was liable to them.

*Garrett W. Walker*, for the Assurance Corporation :—

A receiver appointed under the powers conferred by the Act is a mere creature of the statute, and he must apply the rents and profits collected by him as thereby directed. The words of clause (iv) of section 24 (8) are "accruing due," and the Court cannot construe the clause as if those words were preceded by the words "accrued and": to do so would be to disregard clear and unambiguous expressions. When the language of a statute is plain the Court is not at liberty to alter it: see the judgments in *Abley* v. *Dale* (1) and *Nuth* v. *Tamplin* (2). Where from the nature of the subject-matter it is obvious that it is intended to deal with arrears of interest different language is used in the Act: see clause (ii) of the same sub-sect. and sect. 21 (3). The words of the clause in question can have but one meaning, and the Court cannot alter the plain language of the Act on a mere presumption as to its supposed policy. The policy may have been to discourage the

(1) 20 L. J. (N. S.) C. P. 233. (2) 8 Q. B. D. 247.

piling up of arrears against *puisne* mortgagees, at the same time leaving the personal remedy against the mortgagor unaffected.

[THE VICE-CHANCELLOR referred to the concluding paragraph of section 24 (8).]

It could not have been intended that the receiver was to be bound to take an account of the arrears due at the date of his appointment. Some analogy may be found in the words "owing or accruing" in the provisions as to garnishee orders: see *Webb* v. *Stenton* (1), and the judgment there (p. 527) of Lindley, L.J. Moreover, the language of the Act is different from that used by conveyancers at the time, and therefore a different effect may fairly be presumed to have been intended: see 2 Davidson's Precedents (4th Ed.), Part 2, p. 738, Form 53. Further, the Court forms of order vary according as there are, or are not, arrears to be paid off: see 1 Seton, Judgments and Orders (5th Ed.), p. 671, Form 6, p. 673, Form 14. Accruing gales, accruing annuities, even accruing costs, are well known forms of expression, and have a prospective meaning. In the notes under Form 83 in 2 Key and Elphinstone's Precedents (4th Ed.), p. 271, it is stated in reference to Lord Cranworth's Act (23 & 24 Vict. c. 145)—which for the present purpose may be regarded as identical with the statute in question—that it only enables the receiver to pay interest "accruing" due, and not arrears.

*O'Connor, Q.C.*, for the plaintiffs:—

The word "accruing" is used here in an elastic sense. The receiver was appointed because the interest was in arrear. The fact that interest is in arrear for two months gives the right to the mortgagee to appoint a receiver under the Act: see section 24 (1), section 20 (ii). It would be absurd if the receiver immediately after his appointment were to be bound to hand over moneys received by him to the mortgagor, or a *puisne* mortgagee, while the arrears of interest on account of which the receiver was appointed still remained due to the person appointing him. If the word "accruing" is to have the limited meaning contended for it must mean accruing at the date of the receipt of the money by

(1) 11 Q. B. D. 518.

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the receiver, which would be a still more absurd result than that contended for: see Wolstenholme, Brinton, and Cherry's Conveyancing Acts (7th Ed.) 77, note, where the contrary view of the section is taken to that cited from Key and Elphinstone's Precedents with respect to the former statute.

THE VICE-CHANCELLOR held that the receiver was bound to pay the arrears of interest due to the plaintiffs at the date of his appointment, as well as interest subsequently becoming due.

Solicitor for the Assurance Corporation: *R. H. Beauchamp.*
Solicitor for the plaintiffs: *W. H. Dunne.*

D. M'C. M.

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*V.-C.* 1897. Dec. 15, 16. 1898. Jan. 13.

## ATTORNEY-GENERAL (AT THE RELATION OF CURLEY AND OTHERS) *v.* BELFAST CORPORATION.

(1897. No. 481.)

*Corporation—Superfluous land—Disposition of—Fee-farm grant—Amount of rent—Compromise of litigation with grantee—By-laws—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *sect.* 202—*Local Government Board (Ireland) Provisional Orders Confirmation (No.* 3) *Act*, 1891 (54 & 55 *Vict. c. lvii*).

A Corporation, under powers conferred on them, as sanitary authority under the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), by a Local Government Board Order confirmed by Act of Parliament, acquired certain premises for the purpose of widening a street. The order provided that in case any part of the premises were not required for the purpose aforesaid, the sanitary authority might sell the same, or demise or grant the same in fee-farm subject to such rents as might seem expedient to the sanitary authority.

By previous local Acts incorporating the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), the Corporation were given powers of disposing by auction or tender, and subject to certain conditions and restrictions, of lands not required for the purposes of the Acts. One of those Acts gave power to the Council to make by-laws for regulating the carrying on of their business, but provided that no such by-law should be of any force until forty days after the same should have been sent to the Lord Lieutenant, and gave power to him to disallow the same.

By one of certain standing orders adopted by the Council on the 1st January, 1894, for the regulation of their proceedings it was provided that full publicity

should in all cases be given of intended sales or letting of Corporation property, and that all property should in the first instance be put up for sale by auction subject to such restrictions, if any, as might be requisite.

These standing orders had not been sent to the Lord Lieutenant, pursuant to the local Act, nor had they been made under seal or confirmed by the Local Government Board as required by the Public Health Act in the case of by-laws.

Portion of the property was not required for the purposes for which it was taken, and the Corporation advertised it to be let by auction in lots in fee-farm, and fixed reserved prices as to the rents. Lots 11 and 12 adjoined property of R. who had been in successful litigation with the Corporation about windows in his premises, the existence of which prevented another owner from building in accordance with an agreement between him and the Corporation—the carrying out of the Corporation scheme being thus interfered with. There was also another dispute between R. and the Corporation about a right of way claimed by him over other premises. Lots 11 and 12 were not put up for auction, and the Corporation subsequently passed a resolution adopting an agreement with R. to give him a fee-farm grant thereof at a rent about 10 per cent. less than that fixed for the auction as the reserved rate, R. agreeing to relinquish all rights to the windows and passage.

In an action on behalf of ratepayers to restrain the Corporation from acting on the resolution:—

*Held*, that the powers as to superfluous land conferred by the order were not affected by the conditions and restrictions imposed by the earlier Acts; that the standing orders were by-laws, and that, not having been approved, they had not any force; that the Corporation as sanitary authority had under the order a discretion as to the mode of disposing of the superfluous ground either by sale or letting for years, or granting in fee-farm, that no obligation was imposed on them by the Sanitary Act or the order as to how the sale was to be effected whether by public auction or tender, or private agreement; that so long as they performed their trust for the benefit of the ratepayers honestly, and without a view to private advantage, that discretion could not be interfered with by the Court. And the Court being satisfied that the action of the Council and its committee was perfectly *bona fide*, and was believed by them to be beneficial to the city and its inhabitants, and that the unliquidated portion of the consideration for the grant was honestly estimated by the Corporation as worth the difference between the rent agreed to and that fixed as a reserved rate:—

*Held*, that the passing of the resolution to adopt the agreement was within the scope of the authority of the Council, and could not be restrained as being *ultra vires*.

To establish such a case of undervalue as would in itself justify the interference of the Court, it is not enough to show that a higher price might possibly have been obtained: it must be a gross undervalue, a price so inadequate as in itself to show *prima facie* that the transaction was not a fair one.

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MOTION for an injunction.

The action was brought by Her Majesty's Attorney-General for Ireland at the relation of Francis Curley, Hugh K. Mathews, John Scott, James Mairs, and Thomas A. Fisher, against the Lord Mayor, Alderman, and Citizens of Belfast, Thomas Brown, and Otto Jaffe, for—1, an injunction to restrain the defendants, the Lord Mayor, Aldermen, and Citizens of Belfast, from carrying out or acting upon a certain resolution passed by the said Lord Mayor, Aldermen, and Citizens, at a special meeting of the Corporation on the 5th May, 1897, with reference to a grant or lease of certain lots of building ground in North-street, in the City of Belfast, known as lots Nos. 11 and 12, to John Robb and Frederick Joseph Robb, on behalf of the Belfast Estate Company, Limited, or to any other person at a rent of £326 5*s*., and from making any grant or lease of the said premises at any rent less than could be obtained from a solvent bidder at a public auction; 2, an order by way of mandatory injunction directing and requiring that the said premises be put up for sale by letting by public auction in accordance with the standing order of the said Corporation in that behalf. The relators sued as ratepayers of Belfast, Curley also suing as a member of the Corporation, who opposed the said resolution. The defendants Brown and Jaffe were sued as members of the Corporation, who respectively moved and seconded the resolution.

On the 13th July, 1897, the plaintiff served notice of motion for an interlocutory injunction to restrain the defendants as above mentioned, and on the 17th July, an order was made (on an undertaking by the defendants) that the motion should stand over until the trial of the action.

On the 10th November, 1897, a consent was signed that notwithstanding the order of the 17th July the plaintiffs might re-enter their motion, and that the hearing of same should be taken as the hearing of the action.

On the 17th November, 1897, John Robb, Frederick Joseph Robb, and the Belfast Estate Company, Limited, commenced an action (1) against the Corporation for specific performance of an

(1) 1897. No. 935.

agreement for the sale of certain premises in North-street, in the City of Belfast.

On the 29th November, 1897, an order was made that the said J. Robb, F. J. Robb, and the Estate Company, should be added as defendants in the first action, that the second action should be stayed, and that the hearing of the notice of motion of the 13th July, 1897, should be taken as the trial of the first action. This was accordingly a renewal of the previous application for an injunction.

The facts of the case, and the legal questions argued, are stated in the judgment of the Vice-Chancellor. The following are some of the principal statutory enactments bearing on the case.

The Belfast Improvement Act, 1845 (8 & 9 Vict. c. cxlii.), gave power to the Council to acquire land for certain purposes, and incorporated the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18). It also provided, amongst other things, as follows:—

47. And be it enacted, That it shall be lawful for the Council from time to time to make such by-laws for regulating the carrying on of their business, and the business of their committees, and for the government of the officers, servants, or other persons in their employment, and to repeal or alter any such by-laws as they shall think fit; provided that no such by-law shall be made, repealed, or altered, unless at least two-thirds of the whole number of the Council shall be present; provided also that no such by-law shall be of any force until the expiration of forty days after the same or a copy thereof shall have been sent, sealed with the seal of the said borough, to the Lord Lieutenant, or other Chief Governor or Governors of Ireland; and if at any time within the said period of forty days the said Lord Lieutenant, or other Chief Governor or Governors, with the advice of the Privy Council of Ireland, shall disallow the same by-law, or any part thereof, such by-law, or the part thereof disallowed shall not come into operation; provided also that it shall be lawful for the said Lord Lieutenant or other Chief Governor or Governors, at any time within the said period of forty days, to enlarge the time within which such by-laws, if disallowed, shall not come into force, and no such by-law shall in that case come into force until after the expiration of such enlarged time; provided that a copy of such by-law, under the seal of the Mayor, Aldermen, and Burgesses, with a declaration thereon signed by the Mayor of the borough, that the same has been sent, sealed as aforesaid to the Lord Lieutenant, shall be received as evidence of any such by-law, and of the sending and publishing thereof as aforesaid in all Courts of law and equity, and before all Justices.

64. And be it enacted, That in any case in which the Council shall have

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purchased as required under this Act any land, houses, tenements, or premises, within the limits of this Act, which shall not in the opinion of the Council be required for the purposes thereof, it shall be lawful for the Council to sell and dispose of all or any part of such land, houses, tenements, or premises, to such person, and at such time and in such manner as the Council shall think proper; and the receipt of the Treasurer of the borough shall be a sufficient discharge to the purchaser of any such lands, houses, tenements, or premises, for the money in any such receipt acknowledged to be received, anything in the said Lands Clauses Consolidation Act, 1845, to the contrary notwithstanding.

65. And be it enacted, That nothing in this Act contained shall enable the Council to alienate, incumber, or demise, for the purposes of this Act, without the approbation of the Commissioners of Her Majesty's Treasury, or any three of them, any lands, houses, tenements, or premises which they could not have sold, aliened, incumbered, or demised, without such approbation before the passing of this Act, anything in this Act to the contrary notwithstanding.

By the Belfast Improvement Act, 1847 (10 & 11 Vict. c. cclix.), which incorporated the Lands Clauses Consolidation Act, 1845, the Council were empowered (sections 4, 5, 6, 7) for the purposes of that Act, and their Act of 1845, to acquire lands, and to sell by public sale lands acquired, and not required for the purposes of those Acts, and to demise and lease certain of the lands acquired under their Act of 1845, and to sell ground rents of such leases, and the reversions of the lands demised. Section 10 provided that before granting any such lease the Council should advertise for tenders, and should grant such lease to the person making the highest tender by way of rent, if such person should give security, &c.

The Belfast Improvement Act, 1850 (13 & 14 Vict. c. cviii.), recited the Act 10 & 11 Vict. c. cclix., incorporated portion of the Lands Clauses Consolidation Act, 1845, and contained the following provisions:—

23. And whereas, under the provisions of the said recited Act passed in the tenth and eleventh years of the reign of Her present Majesty, the Council of the said borough are authorised to demise and lease any land not required for the improvement of the borough in the form and manner, and for the term, and subject to the conditions therein mentioned; and it is desirable that the said provisions should be amended: Be it therefore enacted that it shall be lawful for the Council if they shall think fit from time to time by indenture under the common seal of the Mayor, Aldermen, and Burgesses of the said borough to demise and lease or grant in such manner and form for such term or interest, whether for lives or years, or in fee-simple, and subject to such fines, rents,

covenants, and conditions, as may be mutually agreed on, so as there be reserved in every such demise, lease, or grant, the best yearly rent which can be reasonably obtained for the same, any land which the Council had at the time of the passing of the said recited Act, purchased, contracted for, acquired or taken under the authority of the said first recited Act, which shall not, in the opinion of the Council, be necessary for the improvement of the said borough, and which they have already agreed, or may hereafter agree, to demise and lease, or grant, as aforesaid, to any person or persons, who shall erect and build, or covenant to erect and build thereon houses, erections, or buildings of such rate or class of building, and upon such plan or elevation, and of such height and with such stories as the Council shall think proper: Provided always that there be a covenant in every such demise, lease, or grant, for the payment of the rent thereby reserved, and for re-entry in case of non-payment thereof, or in failure of any of the covenants therein contained, and that every such tenant, lessee, or grantee, shall give such good or sufficient security for the erecting and completing of every such house, erection, or building, which he shall covenant or agree to erect within the time in which he shall have contracted to finish the same as the Council shall order and direct.

24. And whereas by the said recited Act, passed in the tenth and eleventh years of the reign of Her present Majesty, the Council is only authorized to let land by tender, and it would facilitate the letting and granting of lands by the Council as aforesaid, if they were authorised to let and grant the same by public auction, as well as by tender: Be it therefore enacted, That the Council shall twenty-one days before making any lease or grant, which they are by the said recited Acts, or this Act, or any of them authorised to execute, advertise in at least two newspapers, published in the town of Belfast, for tenders from persons who may be willing to become tenants or grantees of the premises so intended to be demised and leased or granted as aforesaid, or that such premises shall be set up by public auction at a time and place to be specified in such advertisement; and the Council shall make such lease or grant to the person who by tender or at auction shall make the highest offer for the said premises by way of rent, if such offer shall exceed the minimum rent fixed by the Council, provided such person shall give such security as aforesaid for the erecting and completing the buildings thereon: provided always that in any assignment or conveyance of any such lease or grant, or upon any sale of the rent thereby reserved, the purchaser shall not be bound to inquire whether before the said lease or grant was made or executed the provisions hereinbefore contained as to such advertisements and tenders or auctions were duly complied with.

The Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), provides:—

38. Any urban authority may purchase any premises for the purpose of widening, opening, enlarging, or otherwise improving any street, or (with

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the sanction of the Local Government Board) for the purpose of making any new street.

202. Any sanitary authority may for the purposes, and subject to the provisions of this Act, purchase or take on lease, sell or exchange, any lands whether situated within or without their district; they may also buy up any water-mill . . . .

Any lands acquired by a sanitary authority in pursuance of any powers in this Act contained, and not required for the purpose for which they were acquired shall, except where otherwise expressly provided by this Act (unless the Local Government Board otherwise direct), be sold at the best price that can be gotten for the same, and the proceeds of such sale shall be applied towards the discharge of any principal moneys which have been borrowed by such authority on the security of the fund or rate applicable by them for the general purposes of this Act, or if no such principal moneys are outstanding shall be carried to the account of such fund or rate.

203. With respect to the purchase of lands, or of any of the other properties aforesaid (herein included under the term "lands") by a sanitary authority for the purposes of this Act, the following regulations shall be observed (that is to say):—

(1) The Lands Clauses Acts shall be incorporated with this Act, except the provisions relating to access to the special Act, and except section one hundred and twenty-seven of the Lands Clauses Consolidation Act, 1845.

(2) (Publication of advertisements, &c.)

(3) (Petition to Local Government Board, &c.)

(4) (Consideration of Petition.)

(5) (Provisional order.)

Provided, &c.

204. Any sanitary authority may, subject to the provisions of this Act, with the consent of the Local Government Board, let for any term any lands which they may possess, as and when they can conveniently spare the same.

By the Local Government Board (Ireland) Provisional Orders Confirmation (No. 3) Act, 1891 (54 & 55 Vict. c. lvii.), the Local Government Board (Ireland) Provisional Order Belfast Streets Improvement, 1891, was confirmed. That order provided (amongst other things):—

(1) From and after the confirmation of this order by Parliament, the said sanitary authority shall be empowered to put in force the powers of the Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement with respect to the lands described in the deposited plans and book of reference.

(3) In case it shall happen that any part of the lands acquired by the said

sanitary authority in pursuance of any power contained in this order shall not be actually required for the purpose for which they were acquired, it shall be lawful for the said sanitary authority either to sell the same and dispose of the proceeds of such sale as provided by the Public Health (Ireland) Act, 1878, or to demise the same for any term of years, or to grant the same in fee-farm, subject to such rents, covenants, stipulations and conditions as may seem expedient to the said sanitary authority, and the rents reserved upon any such lettings shall be applied towards the discharge of any principal moneys borrowed by such authority on the security of the rates applicable for sanitary purposes under the said Public Health Act; and not later than ten years after the completion of the works hereby authorised, the said sanitary authority shall sell and dispose of, not only all lands acquired by them under the powers herein contained for the purpose of the proposed works, and not actually required for the same, but also all fee-farm or other rents reserved on any such demise or grant.

The standing orders so far as material were as follows :—

At a meeting of the Council of the said City, held on the 1st day of January, 1894, it was resolved that the following Standing Orders be and are hereby adopted for the regulation of the proceedings of the business of the Council, namely :—

37. Full publicity shall in all cases be given of intended sales or letting of corporate property, and all property shall in the first instance be put up to sale by auction, subject to such restrictions, if any, as may be requisite.

47. Any of the standing orders may be suspended on an emergency, provided two-thirds of the members present at the meeting shall deem it advisable, but not otherwise.

*The Right Hon. The Mac Dermot*, *Q.C.*, *Gordon*, *Q.C.*, and *S. L. Brown*, for the relators.

*Meredith*, *Q.C.*, and *R. F. Harrison* (with them *Campbell*, *Q.C.*), for the Corporation.

*The Solicitor-General* (*Kenny*, *Q.C.*) and *Ronan*, *Q.C.* (with them *Megaw*), for the defendants Robb.

The following were referred to :—Lindley, Law of Companies (5th ed.), p. 166 ; *Royal British Bank* v. *Turquand* (1) ; *Mayor, &c., of Oxford* v. *Crow* (2) ; *Attorney-General* v. *Corporation of Avon* (3) ;

(1) 5 E. & B. 248 ; 6 *Ibid.* 327. (2) [1893] 3 Ch. 535. (3) 3 D. J. & S. 637.

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*Goodson* v. *Richardson* (1); *In re Rawlins' Estate* (2); *Parker* v. *Parker* (3); The Municipal Corporations Act, 1840 (3 & 4 Vict. c. 108), sect. 140; The Belfast Improvement Act, 1878 (41 & 42 Vict. c. clxxx.), sects. 31, 32, and 33; and some of the provisions relating to leases and fines in the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and the Settled Land Acts, 1882 and 1884 (45 & 46 Vict. c. 38, and 47 & 48 Vict. c. 18).

1898.
Jan. 13.

THE VICE-CHANCELLOR:—

This action has been brought by the Attorney-General by way of Information at the relation of certain inhabitants of Belfast against the Corporation of that City and two of its members, as special defendants, and by amendment against John Robb, Frederick J. Robb, and the Belfast Estate Company, for an injunction to restrain the Corporation from carrying out or acting on a resolution passed by the Corporation with reference to a grant or lease of certain lots of building ground to the defendants Robb on behalf of the Building Company, and from making any grant or lease of the said premises at any rent less than can be got from a solvent bidder at a public auction.

The resolution of the Corporation was passed at a special meeting of the Town Council, held on the 5th of May, 1897, adopting a report of the Joint Law and Improvement Committee of the Corporation of the 1st of May, 1897, which is in the following terms:—"Messrs. John Robb and Frederick Joseph Robb, on behalf of the Belfast Estate Company, Limited, having offered to take in fee-farm Lots 11 and 12 of the building-ground in North-street, adjoining their premises, at a rent of £326 5*s*., and to relinquish all rights to the windows or ancient lights on the east side of their adjoining premises, which prevented Messrs. Potts and Houston from building their premises to the proper frontage line; also to withdraw any claim to an alleged right of way over a gateway on the ground let by the Council to Messrs. M'Glade, your Committee consider that the arrangement is a satisfactory one, and recommend same to the Council for confirmation. 1st May, 1897."

(1) L. R. 9 Ch. 221, 224. (2) L. R. 1 Eq. 286. (3) W. N. 1872, 150.

The premises in question formed a portion of ground in the City of Belfast, which had been duly acquired by the Corporation under their statutory powers for making an improvement in the city by widening a street called North-street, which leads from the important thoroughfare called the Royal-avenue. The Corporation was obliged to take all the premises at one side of the street, save in the case of one holding, though they required only a small strip of frontage to add to the street, and they consequently had all the ground behind this strip (save in the case of the one holding) to dispose of as superfluous. Their powers in this respect were acquired by them as the Sanitary Authority of the City of Belfast, under the Public Health Act, 1878, sects. 202 and 203, which prescribe the mode of procedure for the purpose of the purchase of lands otherwise than by agreement, namely, by petition to the Local Government Board, to be allowed to put in force the powers of the Lands Clauses Acts in that behalf. Such petition was duly presented, and a Provisional Order made by the Board, entitled Local Government Board (Ireland) Provisional Order Belfast Streets Improvement, 1891, and this order was duly confirmed by an Act of the 3rd of July, 1891. The Provisional Order contained a provision for the sale of superfluous lands acquired thereunder, which I shall afterwards refer to more particularly.

The Corporation had these lands marked on a plan in several lots for sale. Lots Nos. 2 and 3 were those afterwards purchased by Mr. John Robb, and Nos. 11 and 12 were the premises the subject matter of the resolution of the Corporation now sought to be restrained. The premises coloured grey on the plan were not acquired by the Corporation, as they had agreed with the owners of them, Messrs. Potts and Houston, that the Corporation should not be required to purchase the entire of these holdings, but only the small portion of them, being frontage to North-street, which the Corporation required to take for the improvement. The lots 11 and 12 were not set up for sale by auction when the other lots were sold, though included in the advertisements of the sale. The circumstances under which this happened I must presently consider in detail.

The powers of the Belfast Corporation to dispose of ground purchased by them which was not required for actual improve-

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ments were at first derived from the incorporation of the clauses dealing with this subject in the Lands Clauses Act, 1845, into local Acts for the improvement of Belfast passed from time to time as occasion required. These clauses are general in their terms, and empowered the Town Council to dispose of such superfluous lands without prescribing the manner of such disposal, save that they required it to be by absolute sale within ten years from the completion of the works, unless some other period were prescribed by the special Acts; and they directed the purchase-money to be appropriated to the purposes of the special Act, and in default provided that such lands remaining unsold should revert to the original owners.

The first of the Local Acts for Belfast by which this was done was the Improvement Act of 1845, which by section 64 enacted that it should be lawful for the Town Council to sell and dispose of lands, &c., within the limits of that Act, which in their opinion should not be required for the purposes thereof, to such persons and at such time, and in such manner as the Council should think proper, and that the receipt of the Treasurer of the borough should be a sufficient discharge to the purchaser. By section 65 it was enacted that nothing in the Act should enable the Council to alienate, incumber, or demise for the purposes of the Act without the approbation of the Treasury, any lands, &c., which they could not have sold or demised without such approbation before the Act.

By the Belfast Improvement Act, 1847, the Council was empowered to sell or lease lands not required for improvements, and to sell the ground-rents and reversions of lands so leased, and was directed to require tenders for such leasing. That Act also incorporated the Lands Clauses Consolidation Act of 1845, but does not appear to have prescribed any further particulars as to sales.

The Belfast Improvement Act of 1850 by sect. 23 amended the Belfast Improvement Act of 1847 by giving power to the Council to lease or grant, for such term or interest whether for lives or years or in fee-simple, and subject to such fines, rents, &c., as might be agreed on, any lands purchased by the Corporation not necessary for the improvement of the borough. It also recited (sect. 24) that by the Act of 1847 the Council was only authorised to let land by

tender, and that it would facilitate the letting and granting of lands by the Council as aforesaid if they were authorized to let and grant the same by public auction as well as by tender, and enacted [His Lordship read the enacting portion of the section]. These two sections have been much relied on by the relators as applying to and regulating all dispositions of ground or houses acquired by the Corporation and not required for improvement purposes. Their language is far from clear, and I think there is much doubt whether they have so wide an application. The Corporation certainly were given a power under the incorporated sections of the Lands Clauses Act of absolute sale of lands not required for improvements, which they were bound to exercise within the prescribed period of ten years from completion. They also were given under their their Local Acts powers to lease for any term even in fee-farm, or, as these sections express it, in fee-simple; but this is coupled therein with words importing a continuing rent, and covenants, and conditions inconsistent with an absolute sale. The 23rd section by its recital refers only to a power of the Corporation to demise and lease any superfluous land; it makes no provision in terms for a sale, and it is remarkable that through the whole of it the word "sell" is not used. It requires that the best rent should be *reserved* in any such demise, lease, or grant, and that there should be a clause of re-entry for non-payment of it. The 24th section seems to apply only to lettings and fee-farm grants reserving a rent, and cannot apply to sales out-and-out.

This question, however, is not of much importance, as the agreement here sought to be restrained was for a letting at a rent, so that in either view these sections would apply to it, if it was under these local Acts that the improvement we are dealing with was undertaken, and that the ground and premises in question were acquired. But there is another code of Acts applying to the case upon which the defendants rely as authorising the Corporation in the course taken by them, namely, the Sanitary Acts. By the Public Health Act (Ireland), 1878, the Corporation of Belfast was constituted the Urban Sanitary Authority for that district. As such they obtained under section 202 power to purchase, sell, or exchange any lands within their district, and any such lands not

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required for the purposes for which they were acquired were required to be sold, *i.e.* by the sanitary authority, at the best price that could be got for the same, and the proceeds applied towards discharge of the principal moneys borrowed by the sanitary authority. Under the powers conferred on them by this Act the Corporation presented a petition to the Local Government Board for the purposes of the North-street improvement, having previously taken all the steps prescribed by the Act, and they obtained from the Board a Provisional Order enabling them to put in force the powers of the Lands Clauses Act with respect to the purchase and taking of the lands required. The order went on to provide [His Lordship read clauses 1 and 3 of the Order].

An Act confirming this Order was passed on the 3rd July, 1891. It was under this Act that the Corporation proceeded with this improvement, and under it they acquired the ground and premises necessary therefor. The powers given to the Corporation thereby for the disposal of the superfluous ground are very wide and unrestricted. They may either sell it and dispose of the proceeds as provided by the Public Health Act; or demise the same for any term of years; or grant same in fee-farm, subject to such rents, covenants, stipulations and conditions as may seem expedient to them. They are bound to apply the rents on such lettings towards the discharge of any principal moneys borrowed by them on the security of the rates applicable for sanitary purposes; and not later than ten years after the completion of the works thereby authorized they are required to sell all lands acquired by them under the powers contained in the Order and not actually required for the same, and also all other fee-farm or other rents reserved in any such demise or grant.

In my opinion these powers are not affected by the conditions and restrictions imposed by the local Acts of 1845, 1847, and 1850, to which I have referred. They are derived from a source quite different, and must be treated as independent of the previous legislation. The Corporation, as the Sanitary Authority, in my opinion have, under this Provisional Order and the Act confirming the same, a discretion as to the mode of disposing of the superfluous ground, either by sale out-and-out or by letting for terms of years, or by granting in fee-farm. There is no obligation imposed upon

them by the Sanitary Act, or the Provisional Order, or the Act confirming it, as to how the sale is to be effected, whether by public auction, or by tender, or by private agreement. The Corporation are of course trustees of the property, and are bound to exercise their discretion with a view solely to the benefit of their *cestuis que trust*, that is the ratepayers of Belfast; but so long as they perform their trust honestly and without a view to private advantage this discretion cannot be interfered with by this Court. The Legislature has thought fit to give them the discretion, and this Court cannot take it from them. They are elected by the ratepayers of the city as being fit persons to be entrusted with these powers. It was admitted by the leading counsel for the Attorney-General, in opening the case, that no charge was made against the Council as a body, or the members who had the actual management of these matters, of fraud or *mala fides*, and on the facts laid before me, I am satisfied that he was right in making this admission.

These facts are briefly as follows:—Mr. Robb, the purchaser of Lots 2 and 3, which immediately adjoin Lots 11 and 12, had three windows, one over the other, in the side wall of Lot 2, which was next to Potts and Houston's premises, and looked out over a passage running from the street to the rere. It was part of the proposed improvement that Potts and Houston should be enabled to build on the portion of the premises not purchased by the Corporation in such a way that these windows would be blocked, and this was part of the contract between Potts and Houston and the Corporation, the performance of which was insisted on by Potts and Houston. Robb refused to permit this and insisted on his right to the windows. Thereupon the Corporation brought an action in this Division against Robb for an injunction to restrain him from interfering with the proposed change, and this was heard upon motion before the Master of the Rolls, who fully considered the matter and refused the motion, upholding Robb's right to the windows.

The Corporation were advised against proceeding further with their action, and acquiesced in the decision. They proceeded to negotiate with Robb, but without success. By the practice of the Corporation the general direction and management of its real

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property, and of all lettings, leases, and sales thereof, were conducted by a joint Committee of the Council, consisting of the Improvement Committee and the Law Committee, and it was by this Joint Committee that the dispositions of superfluous lands were carried out. They arranged that this should be by lettings, or rather grants in fee-farm, at rents not less than those fixed by them by way of reserved prices. The Joint Committee considered these amounts, and fixed them before the auction. The reserved rent for Lots 11 and 12, in case the same were let by auction, as was then contemplated, was £360 a-year. There has been no proof whatever, nor any ground shown for believing, that there was any *mala fides*, or even want of care or skill on the part of the Committee in fixing those reserved rents, and it turned out that at the auction several of the lots had to be left unsold because of there not being bids up to the required amounts. Mr. Curling, one of the relators, was himself a member of this Committee. Before the auction took place the Committee, in consequence of the dispute with Robb about the windows and the attempts to settle it, decided that it would not be advisable to put up Lots 11 and 12 at the auction, and gave directions to Sir S. Black, the Town Clerk, to withdraw them. The auction was held on the 29th of July, 1896, and these lots were not put up, and in answer to inquiries then made on the subject the Town Clerk stated that it was not intended to sell them at present. Subsequently further communications were made to the Corporation by Mr. Robb or his representatives, the defendants Robb and the Belfast Estate Company, for a settlement of this dispute. There was also another dispute between Mr. Robb and the Corporation as to other premises not adjoining those now in question, which the Corporation had let to a person named M'Glade, about a right of way and some rights connected with drainage or sewage, for which Robb had brought an action against M'Glade, which was then unsettled. Mr. Robb appears to have been a very sturdy litigant, and not disposed to give up any claims through fear of legal proceedings. Accordingly the Corporation or their Committee and advisers thought it would be very desirable to come to an amicable arrangement with him. About this time Mr. John Robb died, and in April, 1897, his representatives made a proposal to the

Corporation for a settlement of these disputes, in consideration of a grant in fee-farm to them of Lots 11 and 12 at £326 5*s.* a-year. This was £33 15*s.* under the reserved rent fixed by the Committee. The Committee met on the 27th of April, 1897, and considered this offer, and came to the conclusion that it would be advisable to accept it, the relator Mr. Curling alone dissenting. They accordingly reported to the Council that it should be accepted. It was sought to discredit the proceedings of the Committee by the charge or insinuation that they were misled, if not deceived, by the Town Clerk as to these lots not having been set up for sale. The Town Clerk swears, and I believe his statement, that no such statement as alleged was then made by him, and it is plain that the Committee could not have been misled, as they knew well that these lots had been withdrawn from sale by their express directions. The report of the Committee could not therefore have been based upon the mistaken belief that they had been set up for auction. A special meeting of the Council to consider this Report was held on the 5th of May, 1897, and it was resolved to receive and adopt the Report, Curling again being the only dissentient. It was sought to disparage the authority of both the Joint Committee and the Board by showing that the attendances were not full; but I cannot give any heed to such a contention, where the quorum prescribed was in each case present; still less can I canvass the weight of authority of the members present.

The charge was repeated as to this proceeding, that the Council was misled by a mistake, undoubtedly made by the Town Clerk when asked on this occasion whether the lots had been put up for auction, and he said he believed they had. He admits he made this mistake, but it must have been known to the councillors present who were members of the Committee that they had not been put up, and yet no one made any objection on that ground. As far as appears upon the evidence the case was considered on the questions of value, and of the importance of thus effecting a settlement of two litigated questions which prevented the contemplated improvement being carried out, and also relieving the Corporation from their difficulties with Robb and M'Glade. The evidence of Messrs. Brown and Jaffe satisfies me that the Council were not misled as alleged. I am satisfied that the action of the Council and its

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Committee was perfectly *bona fide* and was believed by them to be beneficial to the city and its inhabitants. There is not the slightest proof of anything to ground a charge of fraud or *mala fides* on their behalf.

It was sought to establish such a case of undervalue as would in itself justify the interference of this Court. It is not enough to show in such cases that a higher price might possibly have been obtained, but it must be a gross undervalue—a price so inadequate as in itself to show *prima facie* that the transaction was not a fair one. If the premises were to be let at £325 a-year, without more, I should not even then feel justified in holding that a rent not more than 10 per cent. below the reserved price would be a gross undervalue. But that is not the entire price which was agreed to be given by the purchasers, for there is also an unliquidated portion of great value to the Corporation, one which though it cannot be computed accurately in money would afford good ground for the conclusion arrived at. I believe that this was honestly estimated by the Corporation as worth the £33 15*s.* a-year. I disclaim any authority to interfere with the honest exercise of the discretion by law given to the Corporation on the expediency of concluding this agreement. It was sought also to establish gross undervalue, because an adjoining lot was sold to Mr. Robb at a much higher price. I think that what one lot brought at auction is a very unsafe criterion of what another lot ought to bring, and here there is evidence of a competition for the lot so sold, which is said with some probability to account for the rent obtained. I do not, under the circumstances, attach much weight to the affidavit of Mr. Gilliland.

An argument was also addressed to me as to this consideration outside the proposed rent being in the nature of a fine, but there is no weight in this, for there was nothing to prevent the Corporation or sanitary authority from taking fines, especially when they are required to sell all superfluous lands, and the rents and reversions upon all leases and fee-farm grants within the prescribed period, and to apply all moneys received upon sales or lettings for the purposes of their undertaking. It is not like the case of a tenant for life or other limited owner of settled land when the fines would go to reduce the rent to the prejudice of those in remainder.

I hold that the approving of this agreement and the passing of the resolution to adopt it were within the scope of the authority of the Council, and cannot be restrained as being *ultra vires*. I am of opinion that the discretion of the Council was honestly exercised and cannot be now impeached.

It remains for me to consider the point so strongly relied on by the relators' counsel that by No. 37 of certain standing orders adopted by the Council on 1st January, 1894, for the regulation of the proceedings of their business, it was provided that full publicity should in all cases be given of intended sales or letting of corporate property, and all property should in the first instance be put up to sale by auction, subject to such restrictions, if any, as may be requisite. It was insisted that this standing order applies to the sales in question, and that as the Lots 11 and 12 were not put up to auction the Council had no authority to contract for a sale of them, and that such contract is therefore void, and that its completion should be restrained by injunction.

It is therefore necessary to inquire what force or effect these standing orders have. Any rule or ordinance of a permanent character which a Corporation is empowered to make either by the common or statute law is a by-law (1). Therefore these orders are either a nullity for want of power to make them, or they are by-laws.

The powers of the Corporation to make by-laws given by the Act of 1845 are subject to a proviso that no such by-law shall be of any force till forty days after a copy of the same shall be submitted to the Lord Lieutenant. It is admitted that these standing orders were never submitted to the Lord Lieutenant under this section.

Again, the Public Health (Ir.) Act, 1878, gives power to the sanitary authority to make by-laws for the purposes of the Act, one of which purposes is the disposing of superfluous lands; but it enacts (sect. 219) that by-laws made by a sanitary authority shall be under their common seal. The copy given in evidence does not purport to show that the original was under seal, and in form they purport to be only resolutions of the Council, and are signed by the Town Clerk. Further, in sect. 221 it is enacted that by-laws made

(1) Grant on Corporations, p. 76.

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by a sanitary authority under the Act should not take effect unless and until they should have been submitted to and confirmed by the Local Government Board; and it is not alleged that these have been so submitted or confirmed. They have not therefore any statutory force or authority, and cannot be regarded as binding the Corporation or the Council.

No such point was made at the meeting of the Council on the occasion of the passing of the resolution in question, and the Council acting clearly within the scope of their authority passed it, with the dissent of Mr. Curley alone. He either did not think of the point, or he refrained from raising it knowing that under No. 47 of the same standing orders that order might have been suspended by the Council deeming it a case of emergency, and two-thirds of those present voting for its suspension. There cannot be a doubt that if he had made the point the votes of more than two-thirds of the members present would have deemed it advisable to suspend the 37th standing order. He would in all probability have been once more left in a minority of one on this question.

I am of opinion that these standing orders are in reality by-laws which required the approval of either the Lord Lieutenant in Council or of the Local Government Board to become operative, and that unless and until such approval is obtained they can have no force or effect. I am of opinion that the plaintiff has failed on this ground also.

The prayer of the information is not confined to this particular transaction, but seeks to restrain the Corporation from making any grant or lease of the premises at any rent less than can be obtained from a solvent bidder at a public auction. This portion of the motion must also be refused.

*Refuse motion; and, having regard to consent, dismiss action with costs.*

Solicitor for the relator: *John M'Cormick.*
Solicitor for the Corporation of Belfast: *Sir Samuel Black.*
Solicitors for the defendants Robb: *Johns, Bates, & Johns.*

D. M'C. M.

## IN RE DUNDALK AND ENNISKILLEN RAILWAY CO.; EX PARTE ROEBUCK.

M. R.
1897.
Nov. 24.
Appeal.
1898.
Jan. 19, 20.
Feb. 11.

*Will—Estate in realty—Vesting of estate—Contingent remainder—"If alive."*

K. devised real estate, of which he was seized in fee farm, in the following terms:—"To my daughter Catherine R. for her life, and should her husband W. R. survive her, he is to have them for his life, and at his decease I bequeath them to my nephew J. C. K., if alive: if not, to his next brother E. K.; and in case the latter should also be dead, they are to go to the eldest survivor of my brother's four younger sons."

The testator's daughter survived her husband and all the testator's nephews, some of whom, however, including both J. C. K. and E. K., were alive at the death of W. R.:—

*Held*, by the Court of Appeal (reversing the decision of Porter, M.R.), that the words "if alive" meant if alive at the deaths of both the daughter and her husband, and that, in the events which happened, upon the death of the daughter in 1895, the estate was undisposed of, and passed to the testator's heir-at-law.

THE question in this case arose on a clause of the will of John Augustus Knipe, dated the 1st of December, 1849, which was in the following terms:—"I hereby give and bequeath" the lands of Derrygarra, of which he was seized in fee farm, "to my daughter Catherine Roebuck for her life, and should her husband William Roebuck survive her he is to have them for his life, and at his decease I bequeath them to my nephew John Copeland Knipe, if alive; if not, to his next brother Elliott Knipe; and in case the latter should also be dead, they are to go to the eldest survivor of my brother's four younger sons."

The testator died in 1850. He had one daughter, Mrs. Roebuck, and one son, and no other children. Lady Martin, wife of Sir Richard Martin, was the daughter and heiress at-law of the testator's son, and of the testator. The testator's brother died in 1859, leaving seven sons. The eldest, Thomas Frederick, died in 1893; the second, George Marshall, died in 1876; the third, Samuel Nixon, in 1878; the fourth,

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John Copeland (who was mentioned first in the limitations in the will), died in 1877; the fifth, Francis Morelle White, died in 1856; the sixth, Elliott Augustus (named second in the limitations in the will), died in September, 1878; and the seventh, Frederick, died in 1880.

William Roebuck died in 1869, and Catherine Roebuck died on the 4th of December, 1895; so that with the exception of one, all the sons of the testator's brother survived William Roebuck, but none survived Catherine Roebuck, who was the first tenant for life. John Copeland Knipe was not the eldest, but the fourth son of the testator's brother; Elliott Augustus Knipe was not his next brother (as named in the will), because Francis Morelle White was then alive (1).

Portion of the lands of Derrygarra was taken under their compulsory powers by the Irish North Western Railway Company (formerly the Dundalk and Enniskillen Railway Company) in the year 1863, and the said Company paid into Court the sum of £365 4*s.* 6*d.*, the amount of the award of the arbitrator. In 1865, on the petition of Mrs. Roebuck, the money was invested, and the dividends were paid to Mrs. Roebuck for life.

Thomas Frederick Knipe was the heir-at-law of John Copeland Knipe, who died intestate, and the devisees, under the will of T. F. Knipe, claimed the fund on the death of Mrs. Roebuck, as against Lady Martin, the heiress-at-law of the original testator.

*Meredith, Q.C.*, and *Herbert Wilson*, for Lady Martin.

*D. S. Henry, Q.C.*, and *T. J. Smyth*, for the devisees of Thomas Frederick Knipe.

The Master of the Rolls:—

This matter comes before me on an application on behalf of Lady Martin to pay out a sum of money amounting to £365 4*s.* 6*d.* cash, representing the fee-simple interest in certain lands, which have been compulsorily taken by the Railway Company, and the title to which is involved in the application.

It appears that the lands formed part of a denomination called

(1) It appeared on the hearing of the appeal that the fifth and sixth sons were twins.

Derrygarra, which belonged to John Augustus Knipe, on whose will the question arises. He died in 1850. His will is dated the 1st of December, 1849, and by that will (the greater part of which is immaterial for present purposes) he directed that in case his personal estate and the moneys to arise from the sale of certain lands should be insufficient to discharge two sums of £13,000 and £11,000 mentioned in his will, and all the costs attending the trusts thereof, such insufficiency should be made up by the sale of the lands of Derrygarra, of which he was owner in fee-farm, and which was given to trustees upon trust to "sell and dispose of the same in the same manner as hereinbefore directed of and concerning the Oldtown Estate for the purpose of making up such insufficiency, but should the said lands of Derrygarra not be required for the purpose aforesaid," which was the event which happened, "I hereby give and bequeath them to my daughter Catherine Roebuck for her life, and should her husband William Roebuck survive her he is to have them for his life, and at his decease I bequeath them to my nephew John Copeland Knipe, if alive; if not, to his next brother Elliott Knipe; and in case the latter should also be dead, they are to go to the eldest survivor of my brother's four younger sons."

The application is grounded on the affidavit of Lady Martin, who is a granddaughter of the testator, and who sets out the material matters in the case. The affidavit is very well drawn, and deals with the facts of the case, avoiding irrelevancy. The title of Lady Martin is this. The testator had a daughter Catherine, who became Mrs. Roebuck, and one son. He had no other children, and Lady Martin, the wife of Sir Richard Martin of Plymouth, in the county of Devon, is the daughter and the heiress-at-law of the testator's son, and also the heiress-at-law of the testator: and she claims as such on the ground of there being intestacy as regards the lands devised in the events which have happened. The material dates are these:—Mrs. Catherine Roebuck survived the testator and survived her husband William Roebuck. She died on the 4th December, 1895. The money representing the interest in the lands now in question was paid into Court a long time ago, and an order was made in 1865, that the dividends should be paid to Mrs. Roebuck during her life,

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which order was made on the joint application of herself and her husband, and she received the dividends till her death, except a proportional part which had accrued due when she died. Her husband William Roebuck died in 1869, and it does not appear that there were any children of the marriage, and it is not material if there were. The testator for some reason, I take it, anticipated there would be no children. And therefore, in 1895, the question arose as to the validity and effect of the limitations over (which I have already read) as regards the family of the Knipes, the children of the testator's brother. The testator's brother died in 1859, and had seven sons—that is, besides the two named in the will he had five others. The eldest, Thomas Frederick, died in 1893; the second, George Marshall, died in 1876; the third, Samuel Nixon, in February, 1878; the fourth, John Copeland Knipe (who was mentioned first in the limitations in the will) died in 1877; the fifth, Francis Morelle White, died in 1856; the sixth, Elliott Augustus (named second in the limitations in the will), died in September, 1878; and the seventh, Frederick, died in 1880. It may be seen therefore that, with the exception of one, all the sons of the testator's brother survived William Roebuck, but none survived Catherine Roebuck, who was the first tenant for life. It is only necessary to mention, before considering the legal question involved, that John Copeland Knipe was not the eldest but the fourth son of the testator's brother, and that Elliott Augustus, who, as I have said, comes second in the limitations, was not his next brother, because Francis Morelle White was alive; and of the four younger children (if, as I think it must, "younger" is to be taken in reference to age and not with reference to the succession to the estate), John Copeland Knipe and Elliott Augustus Knipe, who both took express estates under the limitations, are each members of the class of "four younger children"; of the other two, Francis Morelle White Knipe died long ago and Frederick Knipe in 1880.

Now Lady Martin's claim proceeds on the ground that the will does not effectually dispose of the lands, mainly for this reason, as was said by counsel, that the limitation in favour of William Roebuck, the husband of Catherine Roebuck, was a contingent remainder, and the contingency upon which it depended not

having happened, all the subsequent limitations were defeated upon the well-known principle, of which *Doe* v. *Shipphard* (1) is an illustration, that the failure of the first or one of a series of limitations dependent on a contingent event, brings about the failure of the others, if it can be seen that the others depend on it. There might be great difficulty in this case in coming to the conclusion that the subsequent limitations were made dependent on the life estate of William Roebuck, because he was a stranger in blood to the testator, and no doubt only got an estate for life under the will by reason of his being the husband of the testator's daughter, and it is difficult to suppose that it could have been testator's intention that the ultimate disposition of his property should be made to depend on such an event as William Roebuck surviving his (testator's) daughter. But, in the events which have happened, it is not necessary for me to determine that as I am clearly of opinion that in no legal sense is the estate limited on the death of William Roebuck in the nature of a contingent remainder at all. The first gift is to Catherine Roebuck for her life, and the next estate is, in the words I have read, to William Roebuck for his life, should he survive her. No doubt in form it is contingent; that is, "should he survive her." When the case first came on for hearing I was not satisfied that the authorities on the subject had received sufficient consideration, and I adjourned the case to give counsel the opportunity of so doing, and I suggested one or two cases on the subject which I should like to hear discussed. That has now been done, and I must give my decision.

It strikes one as almost an abuse of language that a limitation like this should be called a contingent remainder, for though in one sense it is contingent, that is, it is contingent as to enjoyment, as to estate there is no real contingency, because whether what is called a contingency is expressed or not it is implied in any direct gift of such a character. If the estate were simply limited to Catherine Roebuck for life with remainder to William Roebuck for life, William Roebuck could not enjoy his life estate if he died before Catherine, and in that way his life estate would be contingent on his surviving her. There are many authorities on the subject, but I shall only now refer to one. In *Leadbeater* v.

(1) 1 Doug. 75.

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*Cross* (1) the judgment of the Court was delivered by Lush, J., who says, "The contention on the part of the defendants was that the devise of the estate for life to William Murcott and his wife was a contingent remainder, and that as that estate failed by their death in the lifetime of the tenants in tail, the ulterior limitations, being made dependent on the same contingency, failed also, and consequently the reversion passed to the heir-at-law as upon an intestacy." The language of the will is not distinguishable from that in the present case. "No doubt," he says, "the life estate in question is limited in terms of contingency; terms which, literally construed, make the happening of the event, namely, the survivorship of the tenants for life, a condition precedent to the gift. But we are to look not at the form, but the substance of the devise, and we are of opinion that the testator intended the ultimate devisees to take, whether William Murcott and his wife outlived their daughters and their issue or not, and that there is nothing in the language he has used which obliges us to hold that that intention cannot be carried into effect." He quotes the rule from Jarman:—"Where an estate in remainder is limited in terms of contingency on the happening of certain events, and the events described are precisely those on which (the preceding estates having determined) it will fall into possession, it is construed to be not a contingent gift conditioned to take effect on these events, but a devise immediately vested, the possession of which is necessarily dependent on the events in question." "This rule" he says, "which is deduced by the learned author from the cases which he quotes, could not have been more accurately framed to meet this case, if it had been framed for the purpose, and it is one which commends itself to common sense. The testator gives an estate for life to the father and mother of his granddaughters if they should survive the granddaughters and their issue, to whom he had previously given an estate tail. The event described as the one on the happening of which the gift is to take effect, is precisely that on which they are to enter into possession. The gift being of a life estate only, what is expressed as a contingency is only that which would be necessarily implied if the devise were in

(1) 2 Q. B. D. 18.

the most absolute form. To hold that the ultimate remainder failed because the tenants for life did not outlive the estate tail, and therefore did not enter into possession of their life estate, would, as it appears to us, defeat the plain intent of the testator."

That case is an authority negativing the proposition that the whole series of limitations is to be struck out by reason of the fact that William Roebuck died in the lifetime of his wife. Treating it therefore as a gift for life to Catherine, and remainder to William Roebuck for life, we must see what the subsequent limitations are. "At his decease I bequeath them to my nephew John Copeland Knipe, if alive; if not, to his next brother Elliott Knipe; and in case the latter should also be dead, they are to go to the eldest survivor of my brother's four younger sons." A great deal of argument was addressed to me turning on the words "survivor of my brother's four younger sons" at the end of the series of limitations. The view I take is, that we must first consider the gifts as they stand in the will. It is "to John Copeland Knipe, if alive." He was alive at the death of the testator, and he was alive at the death of William Roebuck, who was the second tenant for life in the series of limitations; and the question is, has the event happened on which he is to take that estate? The gift is "at his decease." That is at the decease of William Roebuck. The words "if alive" must grammatically mean "if alive at that time"—the time of his decease. It is said that the testator expected that William Roebuck would survive his wife, and that his life estate would take effect, and that his intention was to give the estate to John Copeland Knipe if he survived William Roebuck and William Roebuck survived Catherine. But he has not said so. The gift is "at his decease." On the death of William Roebuck in the lifetime of Catherine (in the events which happened) no estate vested in possession, but the estate as a vested remainder could, and, in my opinion, did, pass to him on the death of William Roebuck. The test is this, if the words "if alive" mean "if alive at the death of William Roebuck," can I bring in the additional element of William Roebuck surviving Catherine?

Suppose William Roebuck had survived Catherine, what

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would the construction of the words "if alive" be? They could be referred to no other period than the death of William Roebuck; and on the death of William Roebuck, John Copeland Knipe would have undoubtedly taken. I am not able to give these words a different construction because, as matter of fact, William Roebuck died in the lifetime of Catherine. This construction leads to the vesting of the estate, earlier, perhaps, than the testator intended the enjoyment of the estate to take place; but as matter of mere construction, and, apart from the subsequent limitations contained in the will, I am of opinion that the estate of John Copeland Knipe became vested on the death of William Roebuck; and in arriving at that conclusion I am satisfied that I am carrying out the intention of the testator more exactly and more effectually than if I was to yield to the argument put forward by counsel on behalf of Lady Martin, and decree an intestacy. It is quite plain that the testator never intended or dreamed of intestacy. The whole scheme of the will shows this. He believed he had adequately provided for the family of his deceased son. [See the clause directing the trustees to pay off the sum of £11,000, in which testator was stated to be indebted to the trustees of the will of his son, the late William Beaumaris Knipe.] He had not the least idea of intestacy, and it is not to be presumed by the Court. The subsequent clauses show this. The next clause is "if not," that is if John Copeland Knipe be not alive, "to his next brother, Elliott Knipe"; and as regards this, I may only point out that Elliott Knipe was not the next brother; it makes no matter as regards the legal effect, but shows that the testator was not very familiar with his brother's family, and, perhaps, accounts for some inaccuracies. And then "in case the latter should also be dead, they are to go to the eldest survivor of my brother's four younger sons." Now, I think, it was mainly the contention pressed by Mr. Wilson as regards this, that, from the preceding gifts, "survivor" is to be ascertained from the construction of the last clause, and the argument was that the survivor was to be ascertained at the same time as the life estates fell in, at that time when the death of Catherine or William occurred, whichever lived the longer; and, therefore, if we find that the survivorship is to be ascertained at a fixed period

different from that time at which the other estates would, *prima facie*, take effect, a different construction must be adopted from that which I have arrived at as to the earlier words; and for that proposition reliance was placed on the leading case of *Cripps* v. *Wolcott* (1), which decides that if the term survivor is used it, *prima facie*, refers to the death of the testator; and if an anterior life estate is given it is, *prima facie*, referable to the period of distribution or enjoyment. Here it is to go to the "eldest survivor of my brother's four younger children." I treat it as unimportant, or not coercive as to the result to be arrived at, that two of the members of the class of younger children were those who had been previously mentioned. That only indicates that there must have been some mistake in the testator's mind as regards the ages of his nephews and their order of succession. But the estate is to go to the eldest survivor of the brother's younger children. If the will were: "I bequeath to Catherine for life, and then to William Roebuck for life, with remainder to the survivor of the younger children," there could be no question that the rule relied on would apply; but there is, as I have shown, more than that. The question, however, does not arise as there was a vested estate conferred on John Copeland Knipe, which estate vested on the death of William Roebuck, and part of that estate is now represented by the money, the subject of the application before me.

The claim of Lady Martin to this money has been disputed by a man named Thomas Dunnery, who claims under the will of Thomas Frederick Knipe, who died in 1893, and was the eldest of the family of the testator's brother, George Marshall Knipe. The will of Thomas Frederick Knipe, dated 12th February, 1893, devises and bequeaths all "my land, houses, horses, cattle, stock, and effects thereon and therein, together with my clothes and wearing apparel, to my servant man, Thomas Dunnery." Very likely he did not know that he was, under the terms of this will, parting with the estate; but I have heard no argument put forward on behalf of the heir-at-law to show that the estate would not pass by these words. And even if it did not pass by the gift to

(1) 4 Mad. 11.

*M. R.* 1897. *In re* Dundalk & Enniskillen Railway Co.

Thomas Dunnery, there is in the will an appointment of Robert Walker as residuary devisee and legatee, and he would take the estate if it did not pass under the devise to Dunnery, as it is plain it did.

On the dates Dunnery would appear to be entitled by virtue of this gift, for John Copeland Knipe died in 1877, and his eldest brother, Thomas Frederick Knipe did not die till 1893, and could dispose of the estate, if he took it as heir-at-law of John Copeland Knipe. There is no evidence that John Copeland Knipe died intestate, and, therefore, I cannot decide that Dunnery has established his title at present. If any question as regards this can arise, it can be settled by transferring the money to a separate credit, and I shall order that the money be transferred to the separate credit of the ultimate limitations of the will of John Augustus Knipe in relation to the lands of Derrygarra.

R. W. L.

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*Appeal.* 1898. Jan. 19, 20.

From that decision Lady Martin appealed (1).

*Price*, *Q.C.*, *Stanley*, *Q.C.*, and *Herbert Wilson*, for the appellant:—

The words "if alive" must mean "if alive to enjoy," and as all the nephews died in the lifetime of Mrs. Roebuck, they took no estate in the lands, and the heiress-at-law is entitled: *Cripps* v. *Wolcott* (2); *Fox's Will* (3); *Shaw* v. *Shaw* (4). These were all cases of personal estate, but the same rule applies to realty: *Gregson's Trusts* (5); *In re Belfast Town Council; Ex parte Sayers* (6). Where there are successive life estates the right to the estate in remainder is not to rest on the chance of the dropping of the last, or of the intermediate lives: *Howard* v. *Collins* (7); *Key* v. *Key* (8); *Palmer* v. *Orpen* (9).

(1) In the Court of Appeal before Lord Ashbourne, C., and FitzGibbon, Walker, and Holmes, L.JJ.
(2) 4 Mad. 11.
(3) 35 Beav. 163.
(4) 25 L. R. Ir. 30.
(5) 2 D. J. & S. 428.
(6) 13 L. R. Ir. 169.
(7) L. R. 5 Eq. 349.
(8) 4 D. M. & G. 73.
(9) [1894] 1 I. R. 32.

*Ronan*, Q. C., *Henry*, Q.C., and *T. J. Smyth*, for the respondents:— *Appeal.* 1898.

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If a limitation can be construed as a contingent remainder or an executory devise, it must be dealt with as a contingent remainder. The words "if alive" coming after a gift of several do not mean "if alive to enjoy," but must be taken as referring to the next antecedent, *i. e.* if alive at the death of Wm. Roebuck: *Archer* v. *Jegon* (1); *Grant* v. *Heysham* (2). The contingency attached to the life estate of the husband should not be carried on to the other limitations.

The case was argued by the appellant in the Court below in an entirely different way. It was there contended that if a particular estate is limited upon a contingency, and the subsequent estates are limited as remainders upon it, then if the contingency does not happen the subsequent estates being dependent on it are defeated: *Loddington* v. *Kime* (3); *Davis* v. *Norton* (4); *Doe* v. *Shipphard* (5); and that was also the basis of the argument in *Leadbeater* v. *Cross* (6). The appellant has now abandoned that line of argument. We say that this was a contingent remainder, which became vested on the death of William Roebuck, subject to the life estate of Mrs. Roebuck.

The judgment of the Court of Appeal was delivered by—

HOLMES, L. J.:—

Feb. 11.

The Court is called on in this case to construe a few sentences in a will purporting to dispose, in an event that has happened, of the lands of Derrygarra. No other portion of the will throws any light upon the devise in question, and the only fact connected with the testator's family that must be borne in mind is that he left seven nephews who survived him, all the sons of his brother George. The four youngest were named John, Elliott, Francis, and Frederick, respectively. Of these Elliott and Francis were twins, and as the testator refers to Elliott as being next brother to John, it may be assumed that he was the first born of the twins.

(1) 8 Sim. 446.
(2) 57 L. T. (N. S.) 828.
(3) 1 Salk. 224; Lord Raym. 203.
(4) 2 P. W. 390.
(5) Doug. 75.
(6) 2 Q. B. D. 18.

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There is no doubt that John was the eldest and Frederick the youngest of the four. By the terms of the devise the testator gave a life estate in the lands of Derrygarra to his daughter Catherine Roebuck, followed by a life estate to her husband William Roebuck. These successive life estates are limited in apt and familiar language—"to my daughter for her life, and should her husband survive her he is to have the lands for his life." Both survived the testator; and on his death Catherine became entitled to an estate for her life in possession, and her husband to an estate for his life in remainder. I gather from the judgment of the Master of the Rolls that the principal matter discussed before him was whether this remainder was vested or contingent. It was argued on behalf of the testator's heiress-at-law that the lands were given to William Roebuck on the contingency of his surviving Catherine, and that as this contingency did not happen, the subsequent estates being dependent thereon were defeated on a principle said to have been acted on in *Davis* v. *Norton* (1) and *Doe* v. *Shipphard* (2). It is unnecessary for me to examine these cases, as they have not been relied on in this Court. In one sense every life estate in remainder is contingent, for it will have no existence if the tenant for life is not living when the antecedent estate or estates determine; but this does not arise from words of contingency but from the inherent nature of the estate. The devise to William Roebuck is not altered or affected by the words "should he survive his wife." They are mere surplusage; and the gift to him must be construed as a simple gift in remainder, after a previous life estate. Subject to the two life estates, the will purports to give the lands to one of the four younger children of the testator's brother. Whether any of them, and if so which of them, was to take was made dependent upon a contingent event, and the true point of the present controversy is to ascertain what this event was. As the event, whatever it is held to be, was still a contingency at the time of the testator's death, the gift fulfils the conditions of a contingent remainder, and I see no foundation for Mr. Price's contention that it is an executory devise. Indeed, I was unable to gather, either from his argument or from that of

(1) 2 P. W. 390. (2) Doug. 75.

his opponent, what makes this a matter of importance. Whether it is a contingent remainder or an executory gift, the question of construction is precisely the same, and the same result follows. It is clearly a remainder, and I proceed to consider whether the event upon which it was to vest has happened. The devise immediately follows the life estate to William Roebuck, and omitting words of mere description it runs, "at his death I bequeath the lands to my nephew John if alive, if not to his next brother Elliott, and in case the latter should also be dead they are to go to the eldest survivor of my brother's four younger sons." It will be observed that the words importing the contingency are the words "if alive" following the name of John, which words are also attached by necessary implication to the substituted gifts that follow. The contingency has in fact a fourfold aspect. Each of the four younger sons is given a chance of taking the lands in the order of his age—John first, if alive; then Elliott, if he be alive and John dead; if John and Elliott are both dead, such of their two younger brothers as is alive, and if both are living, the elder. This is, I think, the only possible construction of the language, and it is certainly the only one that has been suggested in the course of the argument; but the final clause of the devise is perhaps not happily expressed. It is, however, I think, sufficiently clear. It is impossible to construe the words as the last survivor of the four, and the only other possible meaning is the eldest surviving of the remaining two.

Up to this point I have adopted Mr. Ronan's argument, and I am in accord, I believe, with the view taken by the Master of the Rolls. The only other matter for consideration is what is meant by the contingent words "if alive." Now if the testator, instead of introducing this clause by the words "at his death," had said "subject thereto," or "subject to these life estates," I cannot conceive the construction to be a matter of doubt. The intention that the person to take should be living to enjoy is clearly marked; and in the case I have put, to construe "if alive" as "if alive to enjoy" would not only carry out the intention but would also be the natural meaning of the words. Does then the phrase, "at his death," make a difference? I am unable to think so. This is a point on which authority gives us no help. There

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are cases like *Archer* v. *Jegon*(1), *Palmer* v. *Orpen*(2), and *Grant* v. *Heysham* (3), in which, after successive life estates, there is a gift on the death of the last-named tenant for life to either a class or to individuals *then* living, and in which it has been held that the word "then" points not to the termination of the successive life estates but to the death of the last-named tenant for life. On the other hand, there are cases like *Harvey* v. *Harvey*(4), *Hetherington* v. *Oakman* (5) and *Gill* v. *Barrett* (6), which seem to decide the contrary. This conflict of authorities, however, presents no difficulty on the present occasion, inasmuch as the language of this will is essentially different. "If alive" is not the same as "if then alive," or "if alive at the death of William Roebuck." It occurs in a sentence containing three branches, which show that what is meant is "if alive to enjoy." Accordingly, I give the words that construction; and as the contingency which would carry the estate never happened in the case of any of the children indicated, the gift has wholly failed, and the heiress-at-law of the testator became entitled to the lands on the death of the last surviving tenant for life.

Solicitor for Lady Martin: *Richard Allen.*
Solicitor for the respondents: *Gilsenan.*

R. D. M.

(1) 8 Sim. 446.
(2) [1894] 1 I. R. 32.
(3) 57 L. T. (N. S.) 828.
(4) 3 Jur. 949.
(5) 2 Y. & C. C. 299.
(6) 29 Beav. 372.

## COLHOUN *v.* TRUSTEES OF FOYLE COLLEGE (1).

*Appeal.* 1898. Feb. 7.

*Landlord and tenant—Lessor and lessee—Covenants usual and proper in building leases—Fee-farm grant—Landlord and Tenant Amendment Act (Ireland)*, 1860 (23 & 24 *Vict. c.* 154), *ss.* 41 *and* 42.

The defendants advertised for tenders for fee-farm grants of building lots in the vicinity of the city of L., subject to conditions, amongst others (*a*) that the lessor's title should not be investigated, and (*b*) that the fee-farm grant should contain all covenants usual and proper in building leases. The draft conveyance furnished by the defendants to the plaintiff, whose tender for some of the lots had been accepted, contained only a qualified covenant for title, to which the plaintiff objected :—

*Held* (affirming the decision of Porter, M.R.), that, in the absence of evidence to show what were usual and proper covenants in building leases, the plaintiff was entitled to the statutable covenants contained in sect. 41 of the Landlord and Tenant Amendment (Ireland) Act, 1860.

THE defendants, a corporate body, established under 59 & 60 Vict. c. cxxxi, in March, 1897, advertised for tenders for fee-farm grants of certain lots of building ground adjoining Foyle College, in the city of Londonderry, upon conditions set forth in a memorandum issued by them. The only two of these necessary to refer to are the following :—

3. The title of the Governors to execute such fee-farm grant shall be admitted by the grantee, and no objection, inquiry, or requisition as to such title shall be made by the grantee, nor shall any searches be furnished by the Governors.

5. Every such fee-farm grant, as aforesaid, shall contain all covenants usual and proper in building leases.

The plaintiff, Joseph Colhoun, tendered for certain lots of the property, and his offer was accepted. The defendants' solicitor sent to the plaintiff a draft of the fee-farm grant proposed to be executed. The draft contained a qualified covenant for title by the defendants, their successors or assigns, or any person claiming

(1) Before FITZGIBBON, WALKER, and HOLMES, L.JJ.

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or deriving from, through, or in trust for them or any of them. The plaintiff objected to the insertion of the qualified covenant, and required either an absolute covenant for quiet enjoyment or the omission of such covenant altogether from the grant. The defendants refused to assent to this.

On the 12th October, 1897, the plaintiff issued a summons under the Vendor and Purchaser Act, asking for a declaration that, on the true construction of the contract for the fee-farm grant, the defendants were not entitled to have inserted in the said grant a qualified covenant for title limited to the acts of the defendants and persons claiming under them.

On the 1st December, 1897, Porter, M. R., gave judgment in favour of the plaintiff, and from that order the defendants appealed.

*Matheson, Q.C.*, and *Osborne*, for the appellants:—

For the last twenty years there is not to be found an absolute covenant in building leases. Davidson, vol. 5 (ed. 1876), p. 76, says the qualified covenant is the usual one; Furlong, p. 494; *Hampshire* v. *Wickens* (1); Pratt on Leases, 285; Woodfall on Landlord and Tenant (14th ed.), p. 125. After the passing of Lord Justice Deasy's Act (23 & 24 Vict. c. 154), the introduction of a limited covenant into the lease excluded the implied covenant contained in the Act.

*Wylie, Q.C.*, for the respondent:—

There is no ground shown why the plaintiff should be deprived of the benefits of the Act of 1860. The carrying out of the agreement would be the same if the clause about usual covenants were not inserted; if there were no such clause, we should be within sect. 41 of the Act. Where the lessee is precluded from investigating the lessor's title, the lessor should give an absolute covenant for title: *Church* v. *Brown* (2). Since the Act of 1860 the usual covenants must be the statutory ones: *Baynes* v. *Lloyd* (3).

Hargreave, J., in settling leases on the Palmerston estate in Rathmines, adopted the unqualified form of covenant, Edge on Leases, p. 132, 2nd ed. See also note in Edge on Leases, p. 10.

(1) 7 Ch. D. 555. (2) 15 Ves. 207. (3) [1895] 2 Q. B. 610.

FITZ GIBBON, L. J.:—

Where a contract for a lease or conveyance provides that the "usual and proper" covenants shall be introduced into the instrument, it becomes an actual term of the contract that those covenants shall be introduced, which were either understood by the parties to be usual and proper, or which, though not so understood, were so well known in the usage of the profession, that knowledge of them should fairly be imputed to the parties. When Lord Eldon said (1) that there was no difference whether the agreement did or did not refer to the usual and proper covenants, because in every agreement it was implied that there were to be "usual and proper covenants," he apparently laid down a proposition which would lead to the conclusion that no distinction existed between the effect of an open contract, and that of an express contract to give the "usual and proper covenants." Such a proposition, if unqualified, would conflict with the undoubted fact that there are obligations which Lord Eldon himself, at p. 263, calls "legal warranties flowing from the words," imposed by the mere use of certain terms, such as "grant" and "demise," which are in effect more extensive than "usual covenants." I venture to say, with all respect for Lord Eldon's *dictum*, that the obligations imposed by statute in Ireland, and recently in England also, work out in the same way, and that express covenants, when introduced, may cut down the statutory obligation, by way of warranty, which would otherwise arise from the use of such words as "grant" or "demise." But it becomes a different question, in point of principle, where a statute imports an obligation, by way of covenant, into an instrument which does not contain an express covenant. Such statutes are passed for the purpose of shortening the document, by making it unnecessary to set out the covenants which are imported. If this be so, we find a good reason for a distinction between the rule which should prevail in Ireland from that which is usual in England, because there is no English statute corresponding to Deasy's Act, sect. 41, which applies both to leases properly so called, and also to fee-farm grants.

(1) *Church* v. *Brown*, 15 Ves. 271.

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Fitz Gibbon, L.J.

In Ireland we have no books of conveyancing, such as they have in England, from which we can discover what covenants are referred to as "usual and proper." But we have a statute which enacts that every lease, not expressly providing otherwise, shall imply a covenant for title, and an unlimited covenant for quiet enjoyment. We are therefore in effect asked to lay down that a contract to give the covenants usual in a building lease may be satisfied by cutting down the obligation which the law implies, and by inserting a covenant which gives less than the statute would give if there were no express covenant. Nothing short of a practice so universal, settled, and known in Ireland that we should hold the parties to have intended to exclude the statutory obligation, would, in my opinion, warrant such a conclusion.

In Mr. Edge's book on Leases, p. 132 (2nd ed.), we find that Hargreave, J., sanctioned leases upon the Palmerston estate under the Landed Property Improvement Act, 1860, in which the qualified covenant was not inserted, and the unlimited statutory obligation was adopted as the proper one. Judge Hargreave was dealing judicially with the estate, and he seems to me to have recognised the principle that, in the absence of express stipulation to the contrary, the parties must be deemed to have contracted upon the basis of the statute. Just as in England the custom of conveyancers fixes what is "usual," so in Ireland the statute shows what is "usual and proper."

Before we could hold that a restriction of the statutory covenant was "usual and proper" in a building lease, we should have distinct proof, at the least, of a custom to insert the limited covenant. The only evidence we have got is to be found in English books of conveyancing. The passage in Furlong, the form of lease adopted by Judge Hargreave, and the note in Edge, all go to show that, where the agreement does not specify the covenants to be inserted, the covenants implied by Deasy's Act, sects. 41 and 42, will bind the parties, and that, if the lessor wants to cut down the statutory covenants for title and quiet enjoyment, he must stipulate expressly to that effect.

That is the way in which the question strikes me in general. But, coming to the particular case before us, it seems to me that we ought to be especially slow to cut down this grantee's protection

by restricting the covenant for quiet enjoyment. This is a contract to take a fee-farm grant of land for building purposes, where large expenditure is to be made by the grantee, and the grantors have stipulated that their title shall not be investigated. The grantors ought to accept the responsibility, and ought to indemnify the grantee, if they are selling what does not belong to them; if they are selling only what they are entitled to, the question of restricting the covenant is a mere academic discussion.

I have assumed that the fifth clause relates to both grantor's and grantee's covenants, though it seems very doubtful whether it was not intended to refer to the grantee's covenants only, there being subsequent and distinct references to two covenants by the grantor.

In my opinion the decision of the Master of the Rolls should be affirmed.

WALKER, L. J. :—

There is no ground for interfering with the decision of the Master of the Rolls We are not dealing with an English lease but with an Irish contract to give a fee-farm grant, by which contract the grantee is bound to make a large expenditure on the land in building. We have not the advantage in Ireland of having the conveyancing books to refer to which the profession has in England; we have, however, the authority of the statement in Furlong's Landlord and Tenant, and the form of lease settled by Hargreave, J., which go to show that, in Ireland, the lessor should, in such a case as this, give an unqualified covenant for title. Further, since 1860, the law is different in Ireland from what it is in England, and it is not unreasonable to hold that the parties should be taken to have contracted with reference to the law, which binds the lessor, in the absence of an express statement to the contrary, by the implication of an absolute covenant. That absolute covenant for title can have existence in two ways, either by putting in an absolute covenant, or by leaving out the covenant altogether. In my opinion the usual and proper covenants will, in this case, include an absolute one for title.

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HOLMES, L.J. :—

The grantee in the proposed fee-farm grant is satisfied to accept the covenant for quiet enjoyment which would be implied by law in such a grant; but the grantor requires that a more limited covenant should be introduced, relying on the term of the contract providing that the grant is to contain the proper and usual covenants in a building lease.

If this question were to arise in England, the Court could refer to many books of precedents in use by conveyancers, and without any other evidence than that afforded thereby, could probably come to a correct conclusion as to the usage. In Ireland, the matter cannot be decided so easily. Since 1860, there is implied in a building lease as well as in every other lease, an absolute covenant for quiet enjoyment unless such a covenant is expressly excluded or a more limited covenant is actually inserted. In face of this enactment it would be difficult to hold without evidence that a covenant in a special limited form is usual and proper. In Furlong's Law of Landlord and Tenant, a book of great authority in this country, published before 1860, it is stated that an unlimited covenant for quiet enjoyment was customary in a building lease, as distinguished from other kinds of demise. In a form of building lease settled by Judge Hargreave in his judicial capacity as Judge of the Landed Estates Court, I find that he allows the implied covenant to operate. Unless there were some evidence to show that the usage is not in accordance with what is laid down by these authorities, I would feel myself obliged to hold that the usual and proper covenant is that which would be implied by the statute in the absence of stipulation to the contrary. There is no such evidence in the present case; and under its special circumstances, a limited covenant would be both unreasonable and improper. I therefore entirely concur with the view taken by the Master of the Rolls.

Solicitor for the plaintiff: *S. Morrison.*
Solicitor for the defendants: *Kelso Reid.*

R. D. M.

## ALLINGHAM *v.* ATKINSON.

(1898. No. 174.)

*V.-C.* 1898. Feb. 28.

*Will—Construction—"All rent and arrears of rent due to me at my decease"—Apportioned part of accruing gale—Grazing money.*

A testator left to G. the townlands of S., B. and C.; to A. the townland of L. and "all rent and arrears of rent due to me at my decease, subject to any headrent or taxes due by me on the aforesaid townlands." He bequeathed to W. his interest in another holding held by I. as tenant, and any arrears of rent due by her at his decease, subject to proportionate part of headrent, &c. The will contained a residuary gift, but the residuary legatee died in the testator's lifetime. The testator died between two gale days. The grazing of part of the lands of S. and B. had been let for eleven months, expiring on a day subsequent to the testator's decease, at a lump sum payable on that day:—

*Held*, that A. was entitled to the arrears of rent due out of the lands of S., B., C. and L. up to the gale day preceding the testator's death, and to an apportioned part of the gale then accruing due; but that he was not entitled to the grazing money which went as undisposed of.

ORIGINATING SUMMONS for the determination of certain questions arising under the will of William Atkinson.

William Atkinson made his will, dated the 13th April, 1896, and thereby, amongst other provisions, declared as follows:—"I leave and bequeath to my nephew, George Andrew Atkinson, the townlands of Sminver, Ballinacarrick, and Cavan. To my nephew, Andrew Hamilton Atkinson, the townland of Legaloscran, and all rent and arrears of rent due to me at my decease, subject to any headrent or taxes due by me on the aforesaid townlands. I bequeath to my nephew, William White Atkinson, my interest in the holding in Cashel, held by widow Irvine as tenant, and any arrears of rent due by her to me at my decease, subject to proportionate part of headrent, &c." The testator left the residue of his property to his wife. He appointed her and Hugh Allingham executrix and executor.

The testator's wife predeceased him. He died on the 13th

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March, 1897, and probate of the will and one codicil thereto was granted to Hugh Allingham, on the 20th September, 1897.

At the testator's death there was due by tenants on the townlands of Sminver, Ballinacarrick, and Cavan, £199 18*s.* 6*d.*, being over one year's rent to the 1st November, 1896, a small portion of which was due out of Legaloscran; a further gale, amounting to £87 15*s.* 2*d.*, was accruing due.

By agreement dated the 31st October, 1896, James Corscadden and John Anderson agreed to take from the testator (thereinafter called the landlord) the use and enjoyment of part of the townlands of Ballinacarrick and Sminver, for the season from the 1st November, 1896, to the 1st October, 1897, for the liberty of grazing the same and pasturing cattle thereon only, and not by way of a letting or tenancy, and to pay the sum of £140 on the 1st May, 1897, to the said landlord for the said grazing, they keeping and maintaining the gates and fences in good order and repair during the said season, the said landlord paying all poor rate, county cess, and other taxes to which the said lands might be liable.

Hugh Allingham took out this summons against George Andrew Atkinson, Andrew Hamilton Atkinson, and Thomas John Atkinson (heir-at-law and one of the next-of-kin), to have it determined whether the £140 grazing-money should be distributed amongst the next-of-kin, or paid to George Andrew Atkinson or Andrew Hamilton Atkinson; whether the £199 18*s.* 6*d.* should be paid to George Andrew Atkinson or Andrew Hamilton Atkinson; and whether the whole, or any part, of the £87 15*s.* 2*d.* should be paid to George A. Atkinson or Andrew H. Atkinson.

*M'Loone*, for the plaintiff.

*Brady*, for Andrew Hamilton Atkinson:—

Andrew Hamilton Atkinson takes the rent due to the 1st November, 1896, in respect of all the townlands devised to himself or George Andrew Atkinson. There are two distinct gifts—one to George of the townlands of Sminver, Ballinacarrick, and Cavan; the other to Andrew of the townland of Legaloscran, and all rent and arrears of rent due to the testator at his decease, and the latter gift is coupled with a liability to pay head rent and

taxes due on "the aforesaid townlands," which possibly supplies a reason for giving the rents of all to Andrew. The language is plain: there is no grammatical difficulty. [Counsel referred to 1 Jarm. Wills, 5th ed., 451, 460, 465.] Secondly, he takes an apportioned part of those rents up to the testator's death. The testator uses the words, "all rent and arrears of rent," pointing to two classes of rent. Rent is considered as accruing from day to day: Apportionment Act, 1870 (33 & 34 Vict. c. 35). Thirdly, he takes an apportioned part of the £140. Though this does not, in strictness, represent rent, the expression grazing rent is in popular use, a grazing letting is a letting of the fruits of the land, and here Andrew Hamilton Atkinson is placed under an obligation to pay the headrent and taxes for the lands in the grazing-letting.

*M'Ilroy*, for George Andrew Atkinson:—

The rent and arrears of rent payable out of Sminver, Ballinacarrick, and Cavan go to George Andrew Atkinson. The provisions as to rent must be read distributively, and each devisee takes the rent payable in respect of the lands devised to him, with the obligation to pay the headrent due thereout. William White Atkinson takes the rents due on Cashel, and is under an obligation to pay the headrent in respect thereof. The grazing money is due in respect of lands devised to Geo. Andrew Atkinson. Even if it is not rent, it is a profit of the land, and goes with it; it is payable on the 1st May, 1897, to the landlord at that date.

*Samuels, Q.C.*, for Thomas John Atkinson and other next-of-kin:—

The residuary gift having lapsed, we contend that there is an intestacy as to the apportioned part of the gale of rent accruing due at the testator's death, and also as to the grazing money. The bequest is of "all rent and arrears of rent due to me at my decease." This does not carry an apportioned part of the gale accruing from the last gale day until the testator's death. In *Sealy* v. *Stawell* (1) the words were all rent and arrears of rent "due *on* the said property." *Roseingrave* v. *Burke* (2) shows that the words

(1) I. R. 2 Eq. 326. (2) I. R. 7 Eq. 186.

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"rent and arrears of rent" mean the same thing, and that "rent" is not to be taken as meaning the apportioned part, as distinguished from the rent actually accrued due. The subsequent words of the will, where there is a bequest of all rent due by Mrs. Irvine, carry only the rent actually accrued due by her, and show what was meant by the testator in the previous bequest of rent and arrears of rent: *Parish* v. *Hudson* (1). The case is distinguishable from *Roseingrave* v. *Burke* (2). The grazing money is not included in the words "rent and arrears of rent." The agreement is express that no tenancy is to be created. The £140 is a mere debt. Moreover, the grazing money consists of one lump sum—there is no periodical payment to which the Apportionment Act could apply. See also *Dease* v. *O'Reilly* (3). There is, therefore, an intestacy as regards the sum in question.

THE VICE-CHANCELLOR:—

The summons deals with three different items:—First, arrears of rent actually due at the testator's death; secondly, the apportioned part of the accruing gale; and, thirdly, the grazing money.

In the first place, I am of opinion that all arrears actually due, including those in respect of Sminver, Ballinacarrick, and Cavan, go to Andrew H. Atkinson. That is the true grammatical construction of the will. The testator leaves to George A. Atkinson those three townlands; he stops there, and then begins a new gift to Andrew H. Atkinson of the townland of Legaloscran, and all rent and arrears of rent due to him at his decease. He does not say rent and arrears out of that townland, but leaves all rent and arrears due, and—which confirms that view—he continues:—"Subject to any headrent or taxes due by me on the aforesaid townlands"—using the plural number. That is to say, in consideration of getting the arrears due on all the townlands, Andrew is to pay the headrent and taxes payable out of all. No argument to the contrary can be derived from the following gift to William W. Atkinson, for the Cashel holding was not one of the townlands described as the aforesaid townlands. The fact that that holding is given in a different way can afford no argument on the construction of the earlier gift.

(1) 55 L. J. (N. S.) Ch. 101. (2) I. R. 7 Eq. 186. (3) 8 I. L. R. 52.

Next as to the second item. In my opinion, on the words of the will, the apportioned part of the rents accruing due is to be dealt with in the same way as the gale actually due at the death of the testator. The Master of the Rolls, in *Sealy* v. *Stawell* (1), says that it is difficult to give a meaning to the word "rent," as distinguished from arrears of rent, except by holding that it applies to the apportioned share of the accruing rents. There is a distinction between the words "rent" and "arrears of rent," and, moreover, under the Apportionment Act, the apportioned part would be personal estate, though it could only be recovered by the remainderman or person entitled to the land, and that after the entire gale had accrued due. On these grounds, I am of opinion that the apportioned part goes with the arrears, and that Andrew H. Atkinson takes it subject to the obligation to discharge a proportion of all headrent and taxes up to the testator's death.

There remains the question as to the £140, and as to this I do not think the same consideration applies, for I do not consider that it can be treated as rent. The grazing contract itself precludes the creation of a tenancy, and the money payable under it cannot be rent. Therefore this sum is undisposed of. The costs must come out of the general residue.

Solicitor for the plaintiff: *Alfred Stubbs.*
Solicitor for Andrew H. Atkinson: *R. Reid.*
Solicitor for Geo. A. Atkinson: *George A. Atkinson* in person.
Solicitors for Thomas J. Atkinson: *Thompson & M'Laughlin.*

D. M'C. M.

(1) Ir. R. 2 Eq. 326.

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1898.
Jan. 19.
Feb. 2, 9.

## DOWD *v.* DOWD.

(1896. No. 583.)

*Will—Bequest to unmarried woman—Direction to settle—Restraint on anticipation—Costs.*

Testator, by his will, bequeathed one-fourth share of his real and personal estate, after certain payments, to his trustees in trust for his daughter A, and declared that the same should be paid, and become a vested interest in A, on her attaining the age of twenty-one years, or marriage with consent of testator's trustees; and the testator directed that the income should be applied in the meantime during her minority for her maintenance, and that in case she should marry, her share should be so settled that she might enjoy the income thereof during her life for her separate use. A married in the lifetime of the testator. After the testator's death a post-nuptial settlement was executed whereby A and her husband assigned to trustees A's share under the said will upon trust to stand possessed of £5000, portion thereof for the husband absolutely, and to invest the residue of the share, and to pay the income to arise from such investment to the husband until his bankruptcy, or until he should assign or charge same, or until his death; then upon trust to pay the income to A for her separate use, without power of anticipation during coverture; then for the children of the marriage, as A and her husband should jointly appoint—in default as the survivor should appoint—and in default of appointment for the children or child of the marriage who should attain twenty-one years, or being daughters should marry, in equal shares.

In an action brought by A and her children to have the post-nuptial settlement declared void, and to have a proper settlement in pursuance of the trusts of the will in relation to A's share approved and settled at Chambers.

*Held*, having regard to the direction in the will, that A's share should be paid to her, and become a vested interest in her on attaining twenty-one years, or marriage, that the settlement made in pursuance of the will should be such as would secure a separate use to A for her life, without power of anticipation; that no settlement beyond this was required by the will; and that subject to such a settlement the *corpus* vested absolutely in A.

*Held*, that the Court could not declare the post-nuptial settlement void, and that inasmuch as the funds, which had been brought into Court under the Trustee Relief Act, were in the hands of the Court, no settlement providing for the separate use of A was necessary, and that the action should be dismissed.

*Held*, that the Court had jurisdiction to allow the costs of all parties out of A's share, notwithstanding the restraint on anticipation on the life estate of A.

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ACTION claiming (1) that a post-nuptial settlement dated 21st July, 1871, expressed to be made between the defendant Richmond Dowd and the plaintiff Anne Elizabeth Dowd, his wife, of the one part, and the defendant Thomas Dunnill and John Craig Parkes of the other part should be declared void, and that same should be delivered up to be cancelled; and (2) a reference to Chambers to have a proper settlement of the said Anne Elizabeth Dowd's share in the residuary estate of Thomas Dunnill, who died on 19th July, 1870, approved of in pursuance of the trusts in his will declared. The testator, by his will dated 11th October, 1864, devised and bequeathed to trustees all his real and personal estate upon trust *inter alia* to stand possessed of one-fourth part of same, which testator declared should be paid to and become a vested interest in the plaintiff Anne Elizabeth Dowd on her attaining the age of twenty-one years, or marriage with the consent in writing of the testator's trustees, which should first happen; and the testator directed that her share should be so settled that she might enjoy the income thereof during her life for her separate use; and, in case she should die under the age of twenty-one years without having married, the testator directed that her share should be applied equally in augmenting the shares bequeathed to the testator's other children.

During the lifetime of the testator, Anne Elizabeth Dowd intermarried with Richard Dowd. After the testator's death the post-nuptial settlement of 21st July, 1871, was executed, whereby the share of Anne Elizabeth Dowd in the real and personal estate of Thomas Dunnill was assigned to trustees upon trust to stand possessed of £5000, portion thereof, for the defendant Richard Dowd, absolutely, and to invest the residue of the said share, and to pay the income thereof to Richard Dowd until his bankruptcy or death, and from and after the determination of the trust in favour of Richard Dowd upon trust to pay the income to Anne Elizabeth Dowd, for her separate use without power of anticipation during coverture, and from and after the determination of the trust in favour of Elizabeth Dowd, in trust for the children of Elizabeth Dowd.

By indenture dated 30th November, 1871, John Craig Parkes was discharged as a trustee of the said settlement, and the

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defendant George Gibson was appointed a new trustee in conjunction with the defendant Thomas Dunnill.

The executors of the will of Thomas Dunnill brought the share of Anne Elizabeth Dowd into Court under the provision of the Trustee Relief Act. The defendants, Thomas Dunnill and George Gibson, presented a petition in the Court of Chancery, praying that the share of Anne Elizabeth Dowd should be transferred to them as trustees of the said post-nuptial settlement, which application was refused, and the order of the Vice-Chancellor refusing same was affirmed by the Court of Appeal in Chancery by order 1st May, 1872: see *Dunnill's Trusts* (1).

By indenture dated 10th March, 1886, Richard Dowd and Anne Dowd assigned by way of mortgage the sum of £5000 limited to him by said post-nuptial settlement to the defendants the Reversionary Interest Society, who on 26th January, 1887, obtained a judgment in an action in the High Court of Justice in England, whereby Richard Dowd was debarred and foreclosed of all equity of redemption in the premises.

The defendants, the Reversionary Interest Society, in their defence submitted that the settlement directed by the will of Thomas Dunnill of the share of the plaintiff Anne Elizabeth Dowd, was for the sole purpose of securing to her the income of her said share during her life, and that subject to providing for her life interest therein no settlement of the said share was directed or contemplated by said will.

On 1st May, 1896, an originating notice of motion was served in the matter of the trusts of the will of Thomas Dunnill, and in the matter of the Trustee Relief Act and the Trustee Act, 1893, for the determination of the questions involved in this action, when the Vice-Chancellor directed the motion to stand over in order that this action should be brought, and held that the questions which were raised could not be disposed of on motion.

*Carton, Q.C., O'Connor, Q.C.*, and *Herbert Wilson*, for the plaintiffs:—

The direction in the testator's will that his daughter's share should be settled was held to be executory in *Dunnill's Trusts* (1).

(1) Ir. R. 6 Eq. 322.

It therefore remains for the Court to direct a proper settlement to be executed. The settlement was intended by the testator to be a marriage settlement. Children come within the consideration of a marriage settlement: *Rochfort* v. *Fitzmaurice* (1). The Court in determining the trusts should make provision for the children of the marriage. This is the ordinary course of marriage settlements: *Duckett* v. *Thompson* (2); *Alt* v. *Alt* (3); *Viret* v. *Viret* (4); *Walter* v. *Parrott* (5). Mrs. Dowd had no right to deprive her children of their interest under such a settlement as the Court would sanction. The post-nuptial settlement is invalid as to the reversionary interest of the wife, because she was restrained from anticipation: *Moore* v. *Moore* (6); *Cooper* v. *Macdonald* (7). Even fraud will not enable the Court to take away the protection of a clause against anticipation: *In re Glanvill* (8).

The mortgage by husband and wife could not bind the wife right by survivorship: *Prole* v. *Soady* (9). The frame of the mortgage gave the defendants the Reversionary Interest Society constructive notice of the post-nuptial settlement, and that the fund dealt with was derived under the will of Thomas Dunnill.

*Serjeant Dodd*, *Q.C.*, and *Donaldson*, for the defendant Richard Dowd:—

Mrs. Dowd took a vested interest under her father's will. Subject to the restraint on her life interest, the capital could be disposed of by her: *Munt* v. *Glynes* (10). *Cooper* v. *Macdonald* (7) is an authority for the defendants on this point. The cases of *In re Glanvill* (8), and *Prole* v. *Soady* (9), only decide that once a fetter is placed on the wife's right to dispose of a fund, it cannot be got rid of. But the wife had a power to dispose of her reversionary interest. In this case, as in *Magrath* v. *Morehead* (11), there is a gift to testator's daughter, with a superadded direction that the fund should be settled on her on her marriage, so as to be free

(1) 2 Dr. & War. 1.
(2) 11 L. R. Ir. 424.
(3) 4 Giff. 84.
(4) 50 L. J., Ch. 69.
(5) 33 Ch. D. 274.
(6) 1 Coll. 54.
(7) 7 Ch. D. 288.
(8) 31 Ch. D. 533.
(9) L. R. 3 Ch. App. 220.
(10) 41 L. J., Ch. 639.
(11) L. R. 12 Eq. 491.

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from her husband's control. Though Mrs. Dowd could not deal with the income by way of anticipation during coverture, she was entitled to dispose of her reversionary interest in the capital: *Laing* v. *Laing* (1); *Loch* v. *Bagley* (2). There was no intention here to benefit children, and no equity has been suggested why the deed should be set aside.

*Serjeant Jellett, Q.C., Matheson, Q.C.*, and *W. M. Jellett*, for the defendants, the Reversionary Interest Society:—

There is nothing in the testator's will which shows that he intended a general settlement of his daughter's shares. This was an absolute gift to his daughter qualified in one event. If she attained twenty-one she had an absolute right to the money. Where the whole gift is executory, the Court will as a rule direct a settlement providing for the issue, though there are cases where this has not been done, *e.g. Loch* v. *Bagley* (2). In *Duckett* v. *Thompson* (3) the whole gift was executory. Here there is no gift over to issue. This case is similar to *Boswell* v. *Dillon* (4). The daughter takes absolutely, subject to the trusts directed by her father's will: Hawkins on Wills, p. 267; 1 Jarman on Wills, 4th Ed., p. 871. The expression "executory trusts" is ambiguous. It may mean either that the trust has been imperfectly expressed, or that the testator left something else to be done. Here the testator fully expressed what he intended.

A provision for children will not be inserted because there is a direction to settle on the wife: *Loch* v. *Bagley* (2); *Laing* v. *Laing* (1); *Young* v. *Macintosh* (5); *Lassence* v. *Tierney* (6). The fact that in *Cooper* v. *Macdonald* (7) the wife retained everything over and above income, shows that in that case there was a restraint on anticipation. The case is an authority for the defendants. A reversionary interest is not subject to an equity to a settlement: *Osborn* v. *Morgan* (8); and once the wife dealt with the property by an acknowledged deed she could not assert her right

(1) 10 Sim. 315.
(2) L. R. 4 Eq. 122.
(3) 11 L. R. Ir. 424.
(4) Drury, 291.
(5) 13 Sim. 445.
(6) 1 M'N. & G. 551, at p. 567.
(7) 7 Ch. D. 288.
(8) 9 Hare, 432.

to an equity to a settlement even if it did exist. And she could not assert her right to it as her *chose in action: Tennent* v. *Welch* (1). [Counsel also referred to Davidson, Conveyancing, vol. 3, pt. 1, p. 142.]

*Gordon, Q.C.*, and *J. Richards*, for the trustees of the post-nuptial settlement.

*Pim*, for the trustee of the will of Thomas Dunnill.

*O'Connor, Q.C.*, in reply:—

This is not a suit to set aside a deed, but to get rid of a deed which is void, because *ultra vires*. The trust in the testator's will was executory in the fullest sense. He has made the Court his conveyancer. The cases cited by Serjeant Jellett, and referred to in Hawkins on Wills, were cases of executed trusts. The same observation applies to *Lassence* v. *Tierney* (2), and *Boswell* v. *Dillon* (3). A mere direction to settle differs essentially from a direction to settle on marriage.

THE VICE-CHANCELLOR:— Feb. 2.

The relief claimed in this action is in terms that a settlement dated the 21st of July, 1871, executed after the marriage of the plaintiff Anne E. Dowd with the defendant Richard Dowd should be declared to be void; and that it should be delivered up to be cancelled; and that a proper settlement of certain funds in Court to the separate credit of the one-fourth part of the real and personal estate of Thomas Dunnill, deceased, bequeathed by the will of the said Thomas Dunnill in favour of his youngest daughter Annie Dunnill, should be settled at Chambers, in pursuance of the trusts in the said will in relation thereto, and that the trusts of the will in relation to said one-fourth share should be carried into execution.

The testator's daughter Annie married in her father's lifetime, and is now the wife of the defendant Richard Dowd, and she and the four children of the marriage are the plaintiffs in this action. The ground upon which the relief is prayed is not fraud, nor is it

(1) 37 Ch. D. 622. (2) 1 M'N. & G. 551. (3) Drury, 291.

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mistake in the ordinary sense for which a rectification of a settlement is sought. The plaintiffs pray that it should be declared void *in toto* and a new deed settled in substitution for it, and this is based on the contention that the trusts of the will being only executory as to this share, it became necessary to have a deed of settlement executed to carry them out, and that the deed executed for that purpose is not authorised by the terms of the will, and is therefore void. The will of Thomas Dunnill, on which this question arises, is dated the 11th of October, 1864. He thereby devised and bequeathed all his property real and personal to trustees, upon trust for his four children, Thomas, Benjamin, Frances (the wife of Mr. Sykes), and Anne, in manner hereinafter expressed, that is to say, as to the one-fourth shares of Thomas, Benjamin, and Frances, respectively, as therein mentioned, and he then proceeds to direct that the trustees should stand possessed of the remaining one-fourth part in trust for his youngest daughter Annie Dunnill, to be paid to her, and become a vested interest in her on her attaining the age of twenty-one years, or marriage with the consent of the trustees, which should first happen, the income thereof to be applied in the meantime during her minority for her maintenance; and, in case his said youngest daughter should marry, he directed that her share of his said estates should be so settled that she might enjoy the income thereof during her life for her separate use; and in case she should die under the age of twenty-one years without having married with such consent he directed that this one-fourth share should be applied in augmenting the shares of his other children.

There is such inconsistency between the gift of this share to Anne, which in the first part shows a clear and unambiguous intention in the testator that she should, on attaining twenty-one or marrying with consent under twenty-one, take absolutely, and be entitled to present payment to herself of her share, and the part immediately following, by which he directed that in case she should marry her share should be so settled that she might enjoy the income thereof for her life, that both cannot, in the ordinary sense of the words used by him, stand together. It was sought to get over this difficulty by contending that the direction to

settle should be confined to the case of her marrying during her minority. But this would, in the first place, render it necessary to supply the words "during her minority" in the later part of the gift, thus working a material change in this important provision; and it would also impute a very improbable intention to the testator to make the settling the income on her for her separate use for life to depend on the chance whether she married before or after she came of age.

But this contention appears to me not to be now open, as it was practically decided by me in *Dunnill's Trusts* (1), in the year 1872—a decision afterwards affirmed by the Court of Appeal—that this fund was not to be paid out during Mrs. Dowd's life: decisions which must have proceeded on the assumption that she did not become absolutely entitled on attaining twenty-one or marrying under twenty-one with consent. In the only report of the case, for there is none of the argument in the Court of Appeal, it appears that it was not suggested that a settlement for her separate use for her life was to be confined to her minority. I there held that the trustees of the subsequent settlement were not entitled to be paid the money out of Court upon the trusts of the settlement. My decision was based on the clause in the will providing for a settlement of the share on the marriage of Anne, for her separate use for life, which was held by me, and affirmed by the Court of Appeal, to have attached to it a restraint on anticipation.

It was on the other hand contended that these apparently contradictory directions are to be reconciled by reading "if she shall marry," in their ordinary grammatical sense, and holding them to extend back to the preceding clause, and override the provisions for payment and vesting by engrafting on them the condition that there must be a settlement made on her marrying at any time, so far at least as securing her a separate use for her life. This seems to me to be the true view, and it involves very little interference with the ordinary meaning of the language of the will. It is too in accordance with what I decided in *Dunnill's Trusts*. (1)

(1) 1. R. 6 Eq. 322.

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This then is the case of an absolute interest first given to Anne, with a trust superadded of her share to be carried out by a settlement on her marriage. The absolute gift remains operative so far as it is not defeated by the subsequent trust, and the interest at the outset given to her, remains her's still, save so far it was qualified by the provision for the share being so settled in case she shall marry, that she may enjoy the income thereof for her life, for her separate use.

Then arises the important and difficult question what the nature of the settlement directed by the will should be; whether it should be confined to a mere settlement of the income upon Anne Dowd for her life for her separate use without anticipation, or whether it should be a strict settlement of the share, both *corpus* and income, in the usual course of money settlements when directed by this Court. The latter would, as a matter of course, include the former, and also include provision for the children of the marriage with all consequential clauses. I will only refer to the case of *Duckett* v. *Thompson* (1), where I considered the nature of a settlement to be approved by this Court under a trust for an unmarried lady, to be paid upon her marriage, and to be settled upon her by her settlement, and held that a settlement not only upon her but on her children was to be directed by the Court. I consider the rule and practice of this Court to be that, in the absence of any expression of intention of the donor to the contrary, a settlement to be made upon or in contemplation of marriage must be in the usual course of marriage settlements with provisions for the wife and the children of the marriage. Therefore, if the testator had merely directed that Anne's share should upon her marriage be settled, it would be the duty of this Court, or of trustees invested with adequate authority out of Court, to have a settlement prepared according to the ordinary course of such settlements, with provisions for the wife's separate use, without power of anticipation, and for the children of the marriage. But the question arises upon the language of this will, whether the testator has not restricted the settlement which he prescribes, to a provision for securing to his daughter a separate use for her life of the income of her share without the power of anticipation.

(1) 11 L. R. Ir. 424.

It seems to me that in the consideration of this question regard must be had to the absolute nature of the gift to this daughter, and the clear direction that her share should be paid to her, and become a vested interest in her, on her attaining twenty-one, or marrying sooner with consent. This clear language is not to be cut down, or, indeed, in effect, rendered nugatory, unless by language equally clear; nor is it to be restricted, in its operation, beyond what is actually necessary for giving operation to the clause directing the settlement. I must hold that this settlement clause, as I may shortly term it, is clear enough and wide enough to confine the absolute gift, so far as the words of the will expressly provide, that the intended settlement shall secure a separate use for the life of the daughter, carrying with it a restraint on anticipation. This, no doubt, does not give effect to the extended meaning which the law of this Court attaches, in ordinary cases, to the direction to settle; but this extended meaning is here rendered, at least, doubtful by the words, "shall be *so* settled," &c., which seem to me to express that the intention was to specify the kind of settlement directed by the testator, namely, one which will be such as to secure the enjoyment to her of the income for her separate use for her life.

The maxim "expressio unius est exclusio alterius," may, I think, be fairly applied; and, accordingly, the word "settled" may be restricted to the securing the enjoyment of the income to the daughter for her separate use without anticipation. I, therefore, hold that no settlement beyond this was required by the will, and that, subject thereto, the *corpus* of the share remained the property of the wife under the absolute gift to her. The husband's right would be to reduce it into possession, if it was possible for him to do so during the life of the wife. It appears to have consisted entirely of *choses in action*, and these could not be reduced into possession while her life-interest, which was for her separate use, and without power of anticipation, continued. A married woman cannot, even by a deed in which her husband joins, and which is acknowledged by her under Sir R. Malins's Act, deal with her reversionary personal estate when there is a restraint upon anticipation.

I must now refer to the settlement of the 21st July, 1871, and

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made between Richard Dowd and Anne, his wife, of the one part, and two trustees of the other part. It recites the will of Thomas Dunnill and the desire of Anne and Richard Dowd, that the estate and interest of Anne, and of Richard in her right, in the trust estates devised and bequeathed by the will should be settled as therein, and the said Richard and Anne Dowd assigned to the trustees the share and interest to which Anne Dowd or Richard Dowd in her right was, or might become, entitled to under the will upon trust to stand possessed of £5000, portion thereof for Richard Dowd absolutely, and to invest the residue, and pay the interest thereof to Richard Dowd until he should become bankrupt or insolvent, &c., and thereupon to pay the said interest to Anne Dowd for her life, for her separate use, without power of anticipation, and subject thereto, in trust for the children of the marriage as Anne and Richard Dowd, or the survivor of them, should appoint, and in default of appointment, in trust, for the children as therein provided; and if there should be no such child, then in trust for Anne, in case she should survive Richard; and in case Richard should survive Anne, upon such trusts as Anne should appoint; and in default of such appointment, then for the next-of-kin of Anne, as if she died intestate, and without having been married.

This deed was acknowledged by Anne Dowd as a married woman, on the 29th November, 1871, under Sir R. Malins's Act, 20 & 21 Vict., c. 57, thus treating the interest of the wife as reversionary only.

But, as I have already stated, this deed dealing with *choses in action* of the wife, given for her separate use, is excluded from the operation of the Act by the proviso at the end of sect. 1, that nothing therein contained should extend to any reversionary interest to which she should become entitled by virtue of any deed, will, or instrument by which she should be restrained from alienating or affecting the same. So far, therefore, as the deed purported to deal with the wife's interest in these funds it was inoperative. These *choses in action* remain, as regards her, entirely unaffected, and if she survives her husband, who cannot, during her life, reduce them into possession, her right by survivorship would, I apprehend, be her's, as if this settlement had not been executed. If, however, the husband survive his wife, his

right, as her administrator, may not be unaffected by this deed, a question as to which I do not offer any opinion. I must take care that nothing is now done to prejudice the rights, if any, of him, and those deriving under him, and also of the children of the marriage.

It seems to me to follow, from the views I have expressed, that it would be impossible to grant the relief prayed in this action. I cannot declare that the deed of 1871 is void. I am of opinion that the plaintiffs are not entitled to have a settlement approved of by this Court, such as they seek, nor any settlement, save one providing for the separate use of the funds secured for the plaintiff Anne Dowd, without power of anticipation, and this would be useless, as the funds are in the hands of the Court, and protected for her by its orders, and she is undisturbed in the enjoyment of the income. For the same reason, a suit to carry out the trusts of the will as to Anne Dowd's one-fourth share was unnecessary.

I must, therefore, dismiss the action, with costs.

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Feb. 9.

The case stood over for argument on the question of costs.

*Carton, Q.C.*, for the plaintiffs, asked that the costs should be paid out of the fund.

THE VICE-CHANCELLOR: Having regard to the restraint on anticipation, have I any power to give costs out of the fund?

*Carton, Q.C.*, and *O'Connor, Q.C.*, submitted that the plaintiffs should have their costs out of the fund, notwithstanding the restraint on anticipation. The children of Mrs. Dowd were also plaintiffs. In this case the fund was free, and not settled until the decree of the Court.

THE VICE-CHANCELLOR: Was not the fund practically settled by the refusal to pay out the money to the trustees in *Dunnill's Trusts* (1)?

(1) Ir. R. 6 Eq. 322.

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*Carton, Q.C.*:—

Not further than settling it for the life of Mrs. Dowd. This is not a hostile suit but one in effect for administration of the fund, and it makes no difference whether it is brought by the executor or a beneficiary: *Sharp* v. *Lush* (1). In *De Stacpoole* v. *De Stacpoole* (2) costs of a settlement under the Court which should have been paid by the husband were given out of the fund. In this case the testator directed the fund to be settled. If the trustees had administered out of Court they would have been entitled to pay the costs of the settlement out of the trust fund; and if there was any uncertainty as to what the trust should be, the trustees would have been entitled to the costs of a suit properly instituted for the purpose of ascertaining the trusts, and all necessary parties would be entitled to their costs. The trustees did not administer themselves, but paid the money into Court under the Trustee Relief Act. The Court could not ascertain the trusts without a suit. The question was a difficult one, and the litigation was not vexatious.

The restraint against anticipation can be removed under section 39 of the Conveyancing Act of 1881, where it is for the benefit of the married woman. It is for her benefit not to have the costs of this action paid out of her income.

*Serjeant Dodd, Q.C.*, and *Donaldson*, for the defendant, Richard Dowd, said that if the Court could give costs out of the fund, their client did not oppose, and cited *Sedgwick* v. *Thomas* (3), where the restraint on anticipation had been removed so as to allow all parties their costs of an action for rectification of a settlement; and *Fleming* v. *Armstrong* (4), where the costs of a married woman restrained from anticipation had been allowed out of her share in a partition suit.

*Serjeant Jellett, Q.C.*, *Matheson, Q.C.*, and *William M. Jellett*, for the defendants, the Reversionary Interest Society, did not oppose.

(1) 10 Ch. D. 471.
(2) 37 Ch. D. 139.
(3) 48 L. T. (N. S.) 100.
(4) 34 Beav. 109.

THE VICE-CHANCELLOR:—

This is not the case of a suit improperly instituted, as was the case of *In re Glanvill* (1) by a married woman by her next friend in reference to trust funds, to which she was entitled for life without power of anticipation. Here it was necessary to have such an action as the present brought for the purpose of having important questions decided which affected the rights of all the parties. It was in substance an action for the administration of the trust funds. I do not think that the case of *In re Glanvill* (1) applies to the present. The question which arose there was as to the costs of defendants, who were trustees of a fund to which the plaintiff, a married woman, was entitled for her life without power of anticipation. These costs had been ordered to be paid by the next friend of the plaintiff, on the ground that the suit was unnecessary and improper, but with liberty to apply in case they could not be recovered from him for payment out of the share of the plaintiff. An order was made by Bacon, V.-C., for payment of those costs out of the balance in the defendants' hands, representing income of the funds and out of the future income payable to the plaintiff. This order was reversed on appeal, on the ground of the restraint in anticipation, as it appeared that there was no income in hands accrued before the institution of the suit, which was deemed to be the time when the liability of the plaintiff arose. But the Court of Appeal expressly reserved the right of the trustees to apply for payment of their costs out of the *corpus* of the fund.

The Married Women's Property Act, 1893, section 2, altered the law as laid down in *In re Glanvill* (1), by providing that in any action or proceeding by a married woman, or by a next friend on her behalf, the Court should have jurisdiction to order payment of costs of the opposite party out of property which is subject to a restraint on anticipation. This is confined to the costs of the opposite party. It does not in terms extend to giving the costs of the plaintiff out of the fund, but it does not purport to interfere with the jurisdiction of the Court to do so in proper cases. The case of *De Stacpoole* v. *De Stacpoole* (2) was referred to where the costs of a settlement on a female ward were given out of the fund which had been settled on her for life without power of anti-

(1) 31 Ch. D. 533. (2) 37 Ch. D. 139.

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cipation, as the settlement was under the Infants Settlement Act, 1855. This is not directly in point, but is an instance of giving costs out of such a fund in cases where the Court deems they should be so given.

I consider that the present is a case where the action was essential for the dealings with this fund, and that there is no sufficient ground for ordering payment of the costs by any of the parties personally.

I therefore allow all parties their costs, including the costs of the originating motion under the Trustee Act, 1893, which were reserved by the order refusing that motion, out of the trust fund bequeathed to Mrs. Dowd.

Solicitors for the plaintiffs: *Larkin & Co.*

Solicitor for the defendant Richard Dowd: *James Henry.*

Solicitors for the defendants the Reversionary Interest Society: *Barrington & Jellett.*

Solicitors for the trustees of the settlement: *Reeves & Sons.*

Solicitors for the trustee of Thomas Dunnill's will: *Molloy & Molloy.*

T. H. M.

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V.-C. 1897.

Nov. 30. Dec. 6.

## COATES *v.* COATES.

*Separation deed—Annuity—Bequest by will—Satisfaction.*

By a separation deed S. covenanted that he, his executors, and administrators, would pay to his wife an annuity during the term of her natural life the weekly sum of 15*s.* By his will S. bequeathed to his wife a weekly sum of 12*s.*, and the life use of a house and furniture. :—

*Held* (1), that the annuity under the deed was payable to the wife for her life, and not merely during the joint lives of the husband and wife, and (2), that the legacy of 12*s.* could not operate as a satisfaction of the testator's liability under the separation deed of greater amount, and that the bequest of the life use of house and furniture could not be treated as a satisfaction, not being a gift of the same nature as the debt.

ORIGINATING SUMMONS for the determination of the question, whether, upon the true construction of a separation deed, dated 8th September, 1884, and made between Samuel Coates and his

wife, an annuity of 15*s.*, which the husband thereby covenanted to pay to the wife during the term of her natural life, determined on the death of the husband, and if not, secondly, whether a bequest in the husband's will of a weekly sum of 12*s.*, together with the use of a house and furniture during her life, operated as a satisfaction of the liability to pay the annuity under the separation deed.

By the deed of separation, dated 8th September, 1884, the husband for himself, his executors, administrators, and assigns, covenanted with the wife, her executors, administrators, and assigns, that he, his executors, administrators, and assigns, would pay to the wife, her executors, administrators, and assigns, the said weekly separate maintenance for her life. By his will, dated 26th August, 1896, the husband devised and bequeathed his estate to his executor upon trust, and thereby directed him out of the income of certain property to pay to testator's wife for life an annuity of 12*s.* weekly, and also devised and bequeathed to his wife his house and the furniture, and directed his executor to discharge all outgoings, so that his wife should have a life estate therein, free from all outgoings. The testator died on 31st August, 1896, and probate of his will was, on 20th February, 1897, granted to the defendant.

*F. N. Greer*, for the plaintiff Mrs. Coates:—

The wife is entitled to the annuity under the deed for her life. It did not terminate upon the death of her husband. She is also entitled to the benefits under the will, and is not bound to elect. The bequest of 12*s.* per week cannot operate as a satisfaction *pro tanto* of the annuity of 15*s.* per week. [Counsel cited *Gee* v. *Liddell* (1); *Richardson* v. *Elphinstone* (2); *Eastwood* v. *Vinke* (3); *Clark* v. *Sewell* (4).] *Nicol* v. *Nicol* (5) has no application. There the husband and wife were reconciled.

The bequest of a life interest in a house is of a different nature from the annuity, and therefore cannot operate in satisfaction of it.

(1) 35 Beav. 621.
(2) 2 Ves. Jun. 463.
(3) 2 P. Wms. 614.
(4) 3 Atk. 99.
(5) 31 Ch. D. 524.

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*Wylie, Q.C.*, for the defendant:—

The annuity under the separation deed terminated with the death of the husband: *Nicol* v. *Nicol* (1). The difference between the 12*s.* and the 15*s.* is more than made up by the life use in the house given by the husband's will.

The bequest is a satisfaction of the liabilities of the testator under the separation deed: *Atkinson* v. *Littlewood* (2); *Weall* v. *Rice* (3).

Dec. 6.

THE VICE-CHANCELLOR:—

The first question is whether the provision made for the plaintiff by the deed of separation of the 8th of September, 1884, terminated on the death of her husband? I am of opinion that on the true construction of the deed it did not. The deed states the occasion for its execution, namely, the separation of the husband and wife in consequence of unhappy variances existing between them, and, in consideration of the regular payment by the husband to the wife *during the term of her natural life* of the weekly sum of 15*s.*, by way of separate allowance and maintenance, the wife bound herself not to cohabit thenceforth with her husband, or to annoy or molest him, and it was agreed that the weekly allowance should commence, accrue, and be payable to her from the 30th of August, 1884. And the husband thereby for himself, his executors, administrators, and assigns covenanted with the wife, her executors, administrators, and assigns that he, *his executors, administrators,* and assigns should punctually pay to the wife, her executors, administrators, and assigns *the said* weekly separate maintenance as thereby provided. The allowance is therefore expressly payable to the wife for her life, and is payable not only by the husband but by his executors and administrators. No doubt this latter clause might be construed as applying only to any arrears due at the husband's death, but it is certainly wide enough to cover payments accruing after his death. As a matter of construction, I hold that the provision was made for the wife for her life, even in case she should survive her husband.

But it was contended that this, being a deed of separation, is

(1) 31 Ch. D. 524. (2) L. R. 18 Eq. 595. (3) 2 R. & Myl. 251.

to be dealt with in a different way from deeds for other purposes, and must be held to be incapable of subsisting after the death of the husband. There is no authority that I am aware of for this contention, and assuming the construction of the deed to be such as I hold it, I cannot so deal with it. That a deed of separation may be good after the death of the husband I find decided by the Vice-Chancellor of England in *Clough* v. *Lambert* (1). The question is whether it is to be construed as restricted to the joint lives of the husband and wife, and this must depend on the language of the instrument. An analogy was contended for between the case of the death of the husband and the return to cohabitation; but the latter case depends entirely on considerations which have no application to the former.

The second question then arises, whether the bequests to the wife in the will of the husband are to be deemed a satisfaction of the liability of the husband's assets to the payment of the allowance secured by his covenant. The rule of this Court as to the satisfaction of a debt by a legacy is simple in its terms, but it has been so restricted by fine distinctions that it is often hard to know what cases are or are not within it. The debt or obligation here is the personal covenant of the husband and nothing more; the amount is the weekly sum of 15*s*. The gifts by the will are, first, a weekly sum of 12*s*. and the life use of a house and its furniture. The objection that a legacy cannot operate in satisfaction of a debt of greater amount, even *pro tanto*, is sought to be got over by proof that the use of the house and furniture exceeded the deficiency of 3*s*. a-week. But this introduces another objection, namely, that the nature of the gift must correspond with the nature of the obligation which was held in *Bartlett* v. *Gillard* (2), following earlier cases, to be conclusive against satisfaction. If, then, recourse must be had to the house and furniture to get over the prior objection, it must be admitted that the whole of the obligation is not met by a gift of the same nature of the full amount; and, as satisfaction cannot operate *pro tanto*, this latter objection would seem to be equally conclusive. It was sought also to object on the ground that the allowance given by the will was not to arise till a week after the death of the testator. But

(1) 10 Sim. 174. (2) 3 Russ. 149.

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even if such a trivial matter as the delay of one week were to be deemed sufficient evidence of an intention of the testator to take the case out of the general rule, it is conclusively met by the consideration that here there was no interval in the provision for the wife, as it ran from the death of the testator, although the first payment of it was not to be made till the end of a week from the death.

I am of opinion that on the other grounds I have mentioned I am precluded by the authorities referred to in argument from holding that the provision by the will was in satisfaction of the provision by the deed of separation, and I decide that the widow is entitled to both these provisions.

Solicitors for the plaintiff: *White & White.*
Solicitors for the defendant: *Meldon & Co.*

T. H. M.

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V.-C. 1897. Nov. 8.

## HIBERNIAN BANK *v.* LAUDER.

(1893. No. 790.)

***Costs—Creditor's action for administration—No assets.***

It is a general rule, as held in *Bluett* v. *Jessop* (Jac. 240), that where a creditor proceeds against a personal representative for the administration of the personal estate, and the result shows that there was no personal estate at the time of the commencement of the suit, and therefore nothing to pay the costs of the personal representative, and that the personal representative is not in any default, the plaintiff must indemnify the personal representative in respect of the costs of the proceedings.

In an action by creditors for administration it turned out that, owing principally to the fact that pending the action another Court decided that the testator's interest in certain lands (returned by the executrix as assets) did not continue after his death, there were no available assets, and there was a considerable balance due to the executrix, although, if the defendant's schedule of assets for probate purposes had been correct, there would have been sufficient to pay a substantial dividend to the creditors:—

*Held*, that the plaintiffs should pay the costs of the action.

MOTION on behalf of the plaintiffs that so much of the order dated the 26th October, 1897, as directed the plaintiffs to pay the defendant's costs of the action might be discharged, and that the plaintiffs might be at liberty on the hearing of the application to use an affidavit of their secretary filed for the purpose.

The action (commenced by summons) was brought by the Hibernian Bank, Limited, as creditors of Thomas B. Lauder, deceased, for the administration of his real and personal estate. The defendant was his executrix.

On the 13th November, 1893, the Vice-Chancellor made an order for the usual accounts and inquiries.

By the Chief Clerk's certificate, filed on the 21st December, 1896, it was found that the debts due by the deceased amounted to £2264 9*s.* 6*d.*, including a sum of £23 13*s.* 5*d.* due to the plaintiffs; the defendant had received personal estate to the amount of £204 8*s.* 10*d.*, and had paid or was entitled to be allowed on account thereof £1143 11*s.* 4*d.*, leaving a balance due to her of £939 2*s.* 6*d.* on that account; the personal estate outstanding consisted of some debts due on promissory notes; the real estate consisted of certain lands called Cartrons held in fee-farm subject to a mortgage on which a large sum was due.

The case came before the Vice-Chancellor on further consideration on the 26th October, 1897, when he made an order declaring the defendant entitled to her costs of the action to be taxed as executor's costs, and to be paid by the plaintiffs, that the plaintiffs should abide their own costs; and, it being admitted that the outstanding personal estate was of no value, he made no order as to proceedings for recovery thereof; and, it further appearing that the sum due on the said mortgage was more than the value of the real estate, and the mortgagee not desiring a sale of such real estate, he made no order as to the same.

The affidavit of the secretary was as follows:—The deceased at the time of his death (26th September, 1892), was indebted to the plaintiffs in a sum exceeding £1400. The defendant, who was universal legatee under the deceased's will, entered into possession of his estate, but did not prove his will until the 16th August, 1893. The debt due to the plaintiffs had been in the meantime reduced by the proceeds of a policy of insurance held by them and

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by moneys received or recovered from persons jointly liable with the deceased on bills and notes held by the plaintiffs. The defendant in the schedule of assets for probate purposes returned the debts due by the deceased at £1833 0*s.* 6*d.*, of which about £1220 was that due to the plaintiffs, and the assets at £729 8*s.* 9*d.* In October, 1893, the plaintiffs were informed by the solicitor for one of the other creditors that the defendant was about selling some lands, the property of the deceased, with the view of leaving the country and going to reside in England; and it was then suggested that the plaintiffs should issue an administration summons and register it as a *lis pendens*, which was accordingly done. That summons was grounded on an affidavit by the deponent stating that he had been informed that the defendant was in treaty for the sale of portion of the assets: no affidavit was made by the defendant or contradiction given to that statement; nor was it at the time suggested that there were no assets. In his former affidavit the deponent showed that there was then due to the plaintiffs £795 16*s.* 3*d.* This sum had been reduced by moneys recovered from other persons, and if the defendant's schedule had been correct there would have been sufficient to pay the creditors found by the certificate about 6*s.* in the £1 on the amount of the debts found due to them. The proceedings were instituted in order to protect the estate for the creditors. The real estate was believed to be of considerable value. An affidavit of the defendant filed in the action on the 31st January, 1894, as to outstanding personal estate included certain lands of Rosfaraghan, and stated they were of no value though returned in the schedule of assets as worth £200, and amongst the outstanding personal estate was also returned a farm called Ballingowan Glebe. It was afterwards decided in the Land Judge's Court that the interest of the deceased in the said farms had determined, and they were lost to the estate. The facts as to those farms were contained in an affidavit of the defendant filed in the action on the 8th August, 1896: the plaintiffs were previously under the impression that the interest therein was of considerable value; since that time the plaintiffs had been pressed by the defendant to have the certificate made up, and it was only under this pressure that they had proceeded with the matter.

*Matheson*, Q.C., and *R. H. Sheil*, in support of the motion:—

The principle of the cases in which in a creditor's administration suit a plaintiff has been deprived of costs, or ordered to pay costs, is not that it turned out that there were no assets, but that the plaintiff instituted or proceeded with the suit after notice that he could get nothing by so doing. See Daniell's Ch. Pr. (6th Ed.), 1221: *Sullivan* v. *Bevan* (1); *King* v. *Bryant* (2); *Robinson* v. *Elliott* (3); *Fuller* v. *Green* (4); *Attorney-General* v. *Gibbs* (5).

*Fetherstonhaugh*, for the defendant.

THE VICE-CHANCELLOR:—

I have always regarded it as a general rule, as held in *Bluett* v. *Jessop* (6)—a rule on which I have always acted—that where a creditor proceeds against a personal representative for the administration of the personal estate, and the result shows that there was no personal estate at the time of the commencement of the suit, and therefore nothing to pay the costs of the personal representative, and that the personal representative is not in any default, the plaintiff must indemnify the personal representative in respect of the costs of the proceedings. The cases relied on by the plaintiffs seem to me to have no application, for they were cases in which there were assets at the commencement of the suit, out of which the costs of the personal representative could be paid—costs of administration being the first claim to be paid after funeral expenses. Here it turned out that, through no fault of the defendant, the farms which were supposed to be assets, and sufficient for payment of debts were not assets, as the interest of the testator in them had determined; and therefore at no time were there any assets. The result of the suit is that, so far from there being any balance in the hands of the executrix, a balance is due to the executrix, and that there are no other assets.

As to the plaintiffs having been misled by the defendant's affidavit, that affidavit was made perfectly *bona fide* in the belief

(1) 20 Beav. 399.
(2) 4 Beav. 460.
(3) 1 Russ. 599.
(4) 24 Beav. 217.
(5) 1 De G. & Sm. 156.
(6) Jac. 240.

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that the farms were valuable, and that they were available assets. The only other matter is the question as to apportioning the costs of the suit with reference to the time when it came to be known that the farms were not assets. I cannot draw a distinction between the costs before and after that time. The suit having been instituted, and an order for administration obtained by the plaintiffs, it was necessary to bring it to a termination. The plaintiffs did not apply to stay the proceedings or terminate them in any other way. They had nothing to gain by so doing, and they did nothing until called on by the defendant to have the case disposed of. It has been erroneously stated that it was under pressure from the dedefendant that the plaintiffs brought on the suit for further consideration. The defendant had the right to call on the plaintiffs to make up the certificate, or in default that the carriage of the proceedings should have been given to her, and the plaintiffs would have had a right to say they would do nothing, in which case the defendant herself could have applied for carriage, and had the certificate made up. The plaintiffs, however, went on and had the certificate made up, and identified themselves with the further proceedings.

On these grounds I must refuse the motion.

Solicitors for the plaintiffs: *D. & T. Fitzgerald.*
Solicitor for the defendant: *Edward Leech.*

D. M'C. M.

IN THE MATTER OF THE ESTATE OF THE ASSIGNEES OF C. H. HAINES, OWNERS; THE PROVINCIAL BANK, PETITIONERS.

*Ross, J.*
1898.
April 25.
May 9.

*Sale of agricultural tenancy—Land Law (Ireland) Act,* 1881, *sect.* 1 (14).

Where part of an estate sold by the Land Judge on the petition of an incumbrancer consists of an agricultural yearly tenancy, the sale of the tenancy is subject to the provisions of the Land Law (Ireland) Act, 1881, sect. 1 (14).

A LOT of the estate ordered to be sold in this matter consisted of an agricultural yearly tenancy. The petitioning incumbrancers had carriage of the sale. On an application to confirm the sale which had taken place in the locality where the lands were situated, the landlord (Mr. Longfield) objected to the purchaser, and complained of not having been served with notice of the sale under the provisions of section 1 of the Land Law (Ireland) Act, 1881. The petitioners contending that the section was not applicable to sales in the Land Judge's Court, the case was placed in the list for argument upon this question.

*J. H. Moore,* for the petitioners :—

It is contended that this case falls within section 1 of the Land Law (Ireland) Act, 1881. But this is not a sale by a tenant. It is a sale *in invitum : In re Flood's Estate* (1); *Goddard* v. *Ryan* (2). Par. (14) applies to sales under a judgment or process of law against *the tenant* or for the payment of the debts of a deceased tenant, that is, either under a personal judgment against the actual tenant or other process of law, *e. g.* bankruptcy where the assignees as representing the tenant sold, or in the case of a deceased tenant, his personal representative selling voluntarily or under a judgment of the Chancery Division. But the sub-section is quite inapplicable to a sale in this Court under an absolute order obtained by an incumbrancer, which is a proceeding *in rem.* Again,

(1) 7 L. R. Ir. 545.. (2) 10 L. R. Ir. 309.

*Ross, J.* 1898.

*In re* HAINES' ESTATE.

how can the provisions of par. (9) as to apportionment of the purchase-moneys be worked out upon a sale in this Court? The Court referred to in that paragraph is either the Court of the Land Commission or the County Court. There is no provision for service of the notice of the intended sale by any person except the tenant or persons representing him. On a sale in this Court the landlord has no right of pre-emption.

*D. M'Carthy Mahony*, for the landlord:—

Before the Act of 1881 a yearly tenant of an agricultural holding could sell his tenancy without any right of pre-emption by the landlord, who had power, however, of his own mere volition to turn out the purchaser by notice to quit. Section 1 of the Act of 1881 is really a restrictive and not an enabling enactment. As a compensation to the landlord for transforming a tenancy liable to be determined by notice to quit into what is practically a tenure in perpetuity, it fettered the right of sale by the obligation to give notice coupled with the right of pre-emption, or of objecting to the purchaser: *M'Cracken* v. *M'Clelland* (1). If these restrictions were imposed on the tenant, the favourite of this legislation, why should a creditor be placed in a better position? The present case comes under the words "process of law against the tenant" in sect. 1 (14). If a sale were directed under a judgment in an administration action, and the sale were retained in the Court of the Master of the Rolls or Vice-Chancellor, it is admitted that notice must be served, but it is contended that if the sale under such a judgment takes place in this Court notice is unnecessary. Is the landlord's right to depend upon the particular branch of the Chancery Division in which the judgment in such a case is to be worked out with the rather absurd result that in the case of small estates which are those habitually retained in the Rolls Court or the Court of the Vice-Chancellor, the landlord is to get notice and have the right of pre-emption and objecting to the purchaser, while in the case of a large estate which it is not the practice of those Judges to sell in their own Courts, but which are invariably directed to be sold by the Land Judge, the landlord is deprived of these advan-

(1) I. R. 11 Eq. 172.

tages? In section 53 of the Landed Estates Court Act, 1858, proceedings in this Court for a sale in pursuance of a decree or order of the Court of Chancery are described as "the execution" of such decree or order. Par. (14) specifically mentions sale under a "judgment," and unless the words "other process of law" include a proceeding *in rem* they are superfluous. There are three classes of cases enumerated; (*a*), under a judgment against the tenant; (*b*), under *other* process of law; (*c*), under a judgment in an administration suit. In each case the sale is to be in the prescribed manner, *i.e.* as prescribed *inter alia* by Rule 99 of December, 1883, which directs that the person having carriage of the sale is to serve notice on the landlord in form No. 17. "Process" is defined in Comyn's Dig., Process (A. 1, D. 1). An incumbrancer's petition for sale is a process against the owner: Landed Estates Court Act, 1858, sect. 43.

*Moore*, in reply:—

In sales under a judgment of the Chancery Division, the personal representative of the deceased tenant who stands in his place would have carriage of the proceedings. An incumbrancer was left unaffected by the Act of 1881.

May 9.

Ross, J.:—

The question argued in this matter is whether, in the case of an agricultural tenancy sold by this Court, such sale is subject to the provisions of sect. 1, sub-sect. 14, of the Land Law (Ireland) Act of 1881. It is contended on behalf of the incumbrancers that this sale is not "made under a judgment or other process of law against the tenant," that an order for sale in this Court is a proceeding *in rem*, and not a proceeding personally against the tenant; consequently, that the landlord is not entitled to notice, and is deprived of the opportunity of objecting to the purchaser.

On behalf of the landlord it is contended that this Court cannot deprive him of rights which he is entitled to exercise in the case of all sales of tenancies, whether by the tenant himself or under the order of a Court. The framers of the Rules under the Acts of 1881 and 1887 evidently contemplated a sale by this Court as being in the same position as a sale under the order of

*Ross, J.* 1898.

*In re* HAINES' ESTATE.

other Courts. Mr. Moore contends that the rule is partially *ultra vires*.

What was the state of the law before the Act of 1881 was passed? The tenant could make a good assignment at common law of his tenancy to a purchaser, but it was open to the landlord, by a notice to quit served on the purchaser, to terminate the tenancy. In this way he could protect himself against having an insolvent or unsatisfactory tenant thrust upon him. This power of terminating the tenancy is, by the Act of 1881, done away with; but the landlord is not left without some remedy. The tenancy is, for practical purposes, turned into a perpetuity; but in lieu of the power of terminating the tenancy thus taken away, the landlord is afforded an opportunity of objecting for good cause to a purchaser. The section seems to me not an enabling section, but a restrictive section. The tenant himself cannot legally sell under the Act without serving the notice. Neither can an execution creditor under a judgment. Neither can the Court of Bankruptcy. When an action is brought in the Courts of the other Judges of the Chancery Division for the realization of a mortgage on a tenant's interest, that is clearly a process of law against the defendant, and the notice must be served. In disposing of tenancies the Courts do so in such a way as not to infringe on the rights of the landlord (see *per* Chatterton, V.-C., *M'Cracken* v. *M'Clelland* (1)). No reason can be suggested why this Court should act in a different manner. If the incumbrancers' contention is right absurd consequences would ensue. Under sect. 49 of the Landed Estates Court Act, when a decree for sale of any lands in Ireland is pronounced by the Court of Chancery, the sale is to be effected by this Court. But it sometimes happens that, in order to save expense in cases of small estates, the Judges of the Chancery Division direct the sales to be retained in their own Courts. If the incumbrancers are right in their contention, in the case of the small estates the notice must be served, and the landlord will have his right of objection to the purchaser; in the case of the large estates, directed to be sold in this Court, the landlord is deprived of his right of objection.

(1) I. R. 11 Eq. 172.

Where results so absurd would follow such an interpretation, I turn to the words of the sub-section, and ask myself, Am I obliged to adopt this interpretation?

Some light is thrown upon this question by sect. 53 of the Landed Estates Court Act, wherein it appears that the proceedings in this Court, consequent upon a decree for sale of lands by the Court of Chancery, are looked upon as an *execution* of such decree for sale. In all such cases, therefore, the proceedings in this Court are a continuation of a process of law against the owner of the tenancy. But even in the ordinary case of an incumbrancer's petition for the sale of a tenancy without any prior order for sale by the Court of Chancery, how does the case stand? There must be an owner, that is a person beneficially entitled in possession, of an estate, or a trustee for sale. Surely, it is not straining the words of the sub-section unduly to hold that a hostile proceeding for the sale of the owner's estate is a process of law against such owner?

I am of opinion that the petition here is a process of law against the tenant, and I therefore declare that the sale is subject to the provisions of sect. 1, sub-sect. 14, of the Land Act of 1881.

Solicitor having carriage: *Tweedy.*
Solicitors for the landlord: *O'Connor & Dudley.*

W. G.

*M. R.*
1897.
Oct. 28, 29, 30.
Nov. 3, 17.

## INGHAM *v.* MACKEY.

(1897. No. 423.)

*Easement—Prescription—Presumption of lost grant—Extinguishment—Land Judge's conveyance—Landed Estates Court Act, ss. 54, 55, 61—Land Law (Ireland) Act, 1896, sect. 34, sub-sect. 3.*

By deed, dated 11th December, 1896, the Land Judge granted to the plaintiff in fee the bed and soil of the river Shannon adjoining certain townlands mentioned, extending to the middle thread of the river (save and except the sites of certain eel weirs), and the several and exclusive right of fishing for all kinds of fish in the waters flowing over the bed and soil aforesaid, save and except the eel fishings; subject, as to part of the lands granted, to a public right of way, and subject, as to all the premises granted, to such other rights of way (if any) as then existed.

The defendants were owners of the weirs and of all rights of fishing for eels by means thereof.

In connexion with the eel fishery, there was a practice of placing the eels, when caught, in large boxes or tanks which rested on a part of the bed and soil of the river conveyed to the plaintiff. These receptacles were attached to the bank by means of chains, and could be shifted further from, or nearer to, the shore, according to the depth of water. The eels were thus kept alive for marketable purposes. For a period of such length that it might be taken to be forty years, in the absence of proof to the contrary, or, at any rate, of such duration as to justify the inference of a lost grant to quiet possession, the defendants or their predecessors in title had used these receptacles, or somewhat similar appliances, in like manner in connexion with the fishing for eels:—

*Held*, (1) that the right to use the tanks or boxes was an easement. (2) That the conveyance of 1896, being made subject only to "all rights of way," was not made subject to any other easement whatever. (3) That, even assuming the defendants to have been previously entitled to the easement to place and use the receptacles in the manner proved for storing the eels when caught, that easement was extinguished by the Land Judge's conveyance to the plaintiff.

TRIAL OF ACTION.

The plaintiff claimed "an injunction to restrain the defendants, their servants, agents, and licensees, from erecting or placing, and

from permitting to remain erected and placed, upon the bed and soil of the river Shannon adjoining the townlands of Lacka, and Cloon, and Commons, situate in the barony of Clanwilliam, and county of Limerick, the tanks or boxes mentioned in the statement of claim, or from so placing or fixing the same that they shall remain floating in the waters flowing over the lands conveyed to the plaintiff by the deed in the statement of claim mentioned."

The questions arising in the case, and the facts material for the decision, are stated in the judgment.

*The Right Hon. The MacDermot, Q.C., Price, Q.C., Matheson, Q.C.*, and *Brady*, for the plaintiff.

*The Solicitor-General (Kenny, Q.C.), Serjeant Jellett, Q.C., Wright, Q.C.*, and *Vesey Fitzgerald*, for the defendants, the Commissioners of Public Works in Ireland.

*Ronan, Q.C., Meredith, Q.C.*, and *Redmond Barry*, for the defendant Mackey.

The following statutes and authorities were referred to:— 1 & 2 Wm. 4, c. 33, ss. 105–107, 111; 5 & 6 Wm. 4, c. 67; 2 & 3 Vict. c. 61, ss. 23, 31, 37, 44, 73; 9 & 10 Vict. c. 86; 2 & 3 Wm. 4, c. 71, ss. 2, 8; Landed Estates Court Act (21 & 22 Vict. c. 72), ss. 54, 55, 61; Rule 32 of Landed Estates Court Rules of 1859; Purchase of Land (Ireland) Act, 1885; Land Law (Ireland) Act, 1896, ss. 34, 48, 50; Conveyancing Act, 1881, sect. 6, sub-sect. 1; Gale on Easements, chap. 1; Shelford's Real Property Statutes, p. 5; *Lancaster* v. *Eve* (1); *Pyer* v. *Carter* (2); *Cross* v. *Lewis* (3); *Gayford* v. *Moffatt* (4); *Aynsley* v. *Glover* (5); *Angus* v. *Dalton* (6); *Weld* v. *Hornby* (7); *Saunders* v. *Newman* (8); *Ewart* v. *Cochrane* (9); *Simpson* v. *Mayor of Godmanchester* (10); *Papendick* v. *Bridgwater* (11); *Symons* v. *Leaker* (12); *Laird* v. *Briggs* (13);

(1) 5 C. B. (N. S.) 717.
(2) 1 H. & N. 916.
(3) 2 B. & Cr. 686.
(4) L. R. 4 Ch. App. 133.
(5) L. R. 10 Ch. App. 283.
(6) 4 Q. B. Div. 162.
(7) 7 East, 195.
(8) 1 B. & Ald. 258.
(9) 4 MacQ. 117.
(10) [1896] 1 Ch. 214.
(11) 5 E. & Bl. 166.
(12) 15 Q. B. Div. 629.
(13) 19 Ch. D. 22.

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*Dand* v. *Kingscote* (1); *Earl of Antrim* v. *Dobbs* (2); *In re Jameson* (3); *Hamilton* v. *Musgrave* (4).

THE MASTER OF THE ROLLS:—

The plaintiff, Edward Theodore Ingham, claims "an injunction to restrain the defendants, their servants, agents, and licensees, from erecting or placing, and from permitting to remain erected and placed, upon the bed and soil of the river Shannon, adjoining the townlands of Lacka, and Cloon and Commons, situate in the barony of Clanwilliam, and county of Limerick, the tanks or boxes mentioned in the statement of claim, or from so placing or fixing the same that they shall remain floating in the waters flowing over the lands conveyed to the plaintiff by the deed in the statement of claim mentioned."

To the action as originally framed Anthony Mackey was the only defendant; but the Commissioners of Public Works applied for liberty to intervene, and were accordingly joined as defendants, and have been separately represented throughout the proceedings.

The title of the plaintiff, as stated in the claim, commences with a deed of 11th December, 1896, whereby the Land Judge, under the authority conferred upon him by the Landed Estates Court (Ireland) Act, 1858, and the amending Acts, in consideration of £4500 paid by the plaintiff on the 2nd July, 1896, granted to him "the bed and soil of the river Shannon adjoining the townlands of Fairyhall, Montpellier, Portcrusha, Lacka, Cloon and Commons, and Coolbane, extending to the middle thread of the stream of the said river, and situate in the barony of Clanwilliam and county of Limerick, and coloured blue in the map annexed hereto (save and except those parts thereof which are the sites of certain eel weirs acquired in the year 1838 by the late Shannon Commissioners, Limerick District, which eel weirs were then known as the two Island or Castle Weirs, the three Upper Cloon Weirs, the two Lower Cloon Weirs, and the two World's End Weirs, and whereof two only, now known respectively as the Upper Cloon Weir and the Upper Bleach Eel Weir, are still in

(1) 6 M. & W. 174.
(2) 30 L. R. Ir. 424.
(3) [1895] 1 Ir. R. 469.
(4) Ir. R. 6 C. L. 129.

existence), and the several and exclusive right of fishing for all manner and kinds of fish of and in the waters flowing over the bed and soil aforesaid, save and except the eel fishings so acquired as aforesaid, by the said Shannon Commissioners," in fee, subject " as to the said part of the lands of Lacka hereby granted to the public right of way, . . . and subject, as to all the said premises, to such other rights of way (if any) as now legally exist."

This deed contains no express exception or reservation of any right in favour of the defendants or anyone else to place or keep boxes or tanks upon any part of the premises; and it is admitted that the tanks in question have been and are kept by the defendants upon part of the premises granted. The plaintiff would seem therefore to have a *prima facie* case, entitling him to the assistance of the Court. It may be material to mention that though the conveyance to the plaintiff was not, in fact, executed till the 11th December, 1896, the sale to him, by virtue of which he paid his purchase-money, as I have said, on the 2nd July, 1896, took place on the 26th June, 1896, from which date he was the equitable owner. His purchase, which is No. 14 on the rental of the De Burgho estate, included about 4 miles of the bed and soil of the Shannon, *ad medium filum aquæ*, with all the fishing rights therein, except the eel weirs and fishings which I have already mentioned, and is, of course, a very valuable property. It could not be, and was not, argued that, unless the defendants have in some way acquired or retained a right to do what is complained of, the keeping of any permanent or quasi-permanent structures in the place in question would not be an invasion of the plaintiff's rights such as would support this action. The case therefore turned, both in pleading and on the evidence, entirely upon whether the defendants have or have not the right in question, and the *onus probandi* is on them.

It appears that the plaintiff was for many years tenant, under the De Burgho family, of the salmon and trout fishings in the part of the Shannon comprised in his grant. He took the fishings annually, sometimes subletting for a part of the season, but personally using the angling rights nearly every year. Till 1896, however, he had acquired no permanent tenure, and whatever he had he held from the De Burghos.

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The defendant Mackey is tenant under the Board of Works of the eel-weirs excepted from the plaintiff's grant, and of other eel-fishings in the Shannon from Athlone down, at a rent stated to be £2200 a-year. The eels at the place in question are caught during the fishing season (1st July to 31st January) by means of nets placed in the two existing weirs which are situated, as the map shows, in or near the centre of the stream of the Shannon. As the take of eels is very uncertain—enormous quantities being captured on favourable nights, and few or none on others—and as it is therefore manifestly very convenient, if not necessary, to store them so as to avoid waste and to equalize or regulate the quantity to be sent forward to the English markets, a practice has for a considerable time existed (how long, it will be necessary to consider), of placing them living in large boxes or tanks so constructed that when in the river the water will flow through them by means of openings and perforations, too small to allow the eels to escape, thus keeping the fish alive and fresh till wanted. The tanks in question, six in number, are instruments of this sort. Each of them is about 20 feet by 6 feet by 8 feet. They sit in the river resting on the bottom near the bank to which they are attached by means of chains fastened to trees which grow in a place called the "fish-yard," now owned by the defendant Mackey, who bought it (Lot 11) at the sale of the De Burgho estate. His Landed Estates Court conveyance of this lot does not in express terms confer any right over the bed and soil of the river in relation to these tanks. The tanks may be said to be permanent by reason of their size and weight (one of them is proved to be capable of containing at least £500 worth of eels), except that in particular states of the water they are shifted further from the shore or nearer to it within the limits of the chains, in order to insure that the proper depth of water shall pass through them. The defendants claim to be entitled to keep and use them in this way. The right claimed in the pleadings is as follows:—

(1). Mackey: "The right to place and maintain tanks or boxes on that part of the bed and soil of the river Shannon mentioned in the statement of claim, and to secure the said tanks or boxes as therein described, and use the same in connexion with the said weirs and the eel fishing thereat."

(2). The Commissioners of the Board of Works state it thus —"The said boxes or tanks are accessory to and for upwards of forty years have been used in connexion with and are necessary for the enjoyment of such eel fishings, and the said eel weirs and fishings are excepted out of the grant to the plaintiff in the statement of claim mentioned."

At the bar the Solicitor-General for the Board of Works stated the right he asserted was "to place in the soil and bed of the river, in connexion with the fishery, certain tanks for the retention of the fish."

And Serjeant Jellett worded it in two ways:

Either (1), A right annexed to the ownership of the eel weirs to place and maintain on the bed and soil of the river at or contiguous to the present position of the existing tanks such a number of tanks for the reception and preservation of eels taken in the said weirs as might be reasonably necessary for the proper and effective working of the eel fishings of the said weirs.

Or, (2), A right annexed to the ownership of the weirs to place and maintain on the bed and soil of the river Shannon six tanks of reasonable dimensions at or contiguous to their present position for the reception and preservation of eels taken in the weirs mentioned in the pleadings.

In whatever way stated, that which is claimed is in the nature of an easement over the lands of the plaintiff. The land on which the tanks rest is not claimed by the defendants, nor could it be. What they claim is an incorporeal hereditament: the right by the owner of one tenement to use or exercise rights over the land of another. Whether this right is claimed as appurtenant to the eel weirs and fishing, or as a part of the fishing of the weirs themselves and existing *ex vi termini* by an exception of the latter, it is in either case an easement. The defendants lay claim to the right in question in both ways. They say if it was in the nature of an easement merely, they have a prescriptive title to it by virtue of a 40-years' enjoyment as of right, or a 20-years'—though the latter was not relied on; or, if the enjoyment fall short of 40 years'—it has been of such a character and duration as to justify or even call for the presumption of a lost grant. But even if it was not strictly an easement of this

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character, it was part of the fishing itself, and so excepted altogether from the plaintiff's Landed Estates Court conveyance. It is necessary to consider the evidence bearing on these questions, apart from the effect of the last-mentioned instrument.

Under the statute 2 & 3 Vict. c. 61—amending previous Acts—Commissioners were appointed by the Government for the improvement of the navigation of the river Shannon, with large powers ancillary to that object; and in particular with power to execute necessary works and to take lands compulsorily (sect. 31). Lands so taken vested in the Commissioners on payment or lodgment of the purchase-money, and the Act contained the usual arbitration clauses (as to compensation). On completion, all works, &c., acquired by the Commissioners with their powers and duties, vested in the Board of Works (sect. 73), who, as I have said, are now defendants.

Under these statutory powers, the Commissioners acquired in 1839–1840 the eel weirs in question with the others, now disused, mentioned and excepted in the plaintiff's deed of purchase. One George Dowling was at that time tenant of them to Sir R. De Burgho for the unexpired residue of a term of twenty-one years: and he conveyed to the Commissioners by deed of 22nd January, 1840, all his interest in the weirs "together with all ways, rights, and appurtenances thereunto belonging," in consideration of £37 12*s.* 3*d.*, the amount of his compensation as assessed by an inquisition dated the 14th December, 1839, which inquisition also directed the amount payable in respect of the other interests in the said weirs, &c., viz.:—that the sum of £83 6*s.* 8*d.* should be paid into Bank pursuant to the statute. The total compensation of *all* interests in the premises having been previously, viz. on the 14th September, 1839, ascertained at £120 18*s.* 11*d.*

There is therefore no question but that the Commissioners acquired the title to the weirs in fee-simple, and to all rights of fishing for eels by means thereof, and (at least so far as the tenant was concerned) to all "rights and appurtenances" thereto belonging.

For a long series of years the Commissioners of the Board of Works having no doubt abated such of the weirs as were injurious

to navigation, let the others, or new weirs erected in their stead (no question on this distinction now arises) to tenants under agreements from time to time; notably to persons whose successor in some sense the defendant Mackey is; and a series of these letting agreements is in proof, commencing in 1853 and ending with the defendant's lease of December, 1894. The occupying tenants in 1853—and it appears by the proposal of that date, for four previous years—were people of the name of Hartigan, Enright, and Anthony Mackey, who was the defendant's father. And they, or some of them, or persons of their families continued tenants throughout (except during the occupancy for a short time of an English firm). None of these agreements or leases says anything about tanks or any right to have or use any such appliances until the lease under which the defendant holds (31st December, 1894), which mentions in the schedule "5 new tanks cost £100" as "articles supplied" by the lessee. The description of Lot 11 in the De Burgho estate rental says nothing about the easement in question or any easement by the owner of the eel weirs to moor boxes or tanks to trees growing upon the lot sold or otherwise. In short, so far as paper title goes, there is no evidence of the existence of any right such as the defendants claim.

But the oral evidence shows that for a considerable time the existing tanks or some of them have been used as at present: that before them other and smaller tanks called cisterns were used in connexion with the eel fishery at a place near if not identical with the present site; and though there is some confusion as to the precise number of either tanks or cisterns at any given time, just as many were used as were required by the fishery for the time being. The "cisterns" are stated by some of the witnesses to have been perforated boxes kept in place, not by mooring-chains, but by stakes driven into the soil so as to prevent their being drifted away. In any case, I think they must have rested on the bottom if they were perforated at all. The large tanks have been from time to time renewed and replaced as they wore out. They do not last longer than about ten years. This would account for some variation in their numbers at different times. They were first introduced by an English company or firm who had the fishery for a time, about thirty-five or thirty-six years ago. The

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evidence satisfies me that both cisterns and tanks were first employed long after the purchase by the Commissioners of the eel weirs and fishings. Indeed in 1839–1840 the eel fishery must have been a very inconsiderable property, having regard to the price paid for it (£120), and the eels when caught were then, no doubt, taken away at once. The industry has developed to its present dimensions by reason of improved means of carriage by land and sea, whereby the English market has been opened up. The first contrivance seems to have been a sort of boat with watertight compartments, and a tank in the middle for the eels, which was poled up from the eel weirs to a canal, when it was drawn by horses up to Limerick direct, without any other storage. Afterwards boats of this type (called "Daniels") were used in connexion with the cisterns. There were no tanks or cisterns before the old weirs were removed, which occurred about 1849–1850, nor for a considerable time after, probably about 1860–1861. It is difficult to get at dates exactly, as the witnesses on both sides were illiterate and inexact; and it is possible the use of the cisterns may have commenced a little earlier than the latter date; and some of the plaintiff's witnesses admit this. Take, for instance, the evidence of Hickey. He says he remembers the removal of the old weirs about two years after the bad times—that is about 1849 or 1850. He says there were no tanks there then, and that first there came two boats. The first tank was put there in 1861. The tanks were not so large as now, but they were of the same make. Enright, Hartigan, and Mackey were making them year after year, and they made all they wanted. They bought one from Lipsett. And Tuohy says, "I know the place of the tanks; I remember the old weirs, they were taken up about 1846 or 1848. The new weirs were built a year or two after the old were removed. I left in 1855; there were no tanks there then, except boxes set with poles, floating boxes. They took the boxes away up the stream to the shore," and he describes what was done with them. The defendant Mackey remembers the place thirty years, and says the tanks were always exactly as now during that time, having been brought shortly before by the English people (Lipsett), never less than five or six. John Mackey, who had been a rent-warner on the De Burgho property, says he knew the tanks for thirty-five

years, and remembered the cisterns forty-five years ago, the latter being fastened with chains to the bank. Another witness, John Burke, says that in 1866 there were six or seven tanks there as now. Thomas Dowdall, a very good witness, recollects the place for 50 years, 48-50 years ago; and several other witnesses for the defendant gave somewhat similar evidence.

The oral evidence has left on my mind the belief, and I find as a fact, that there were no cisterns, tanks, or any similar appliances in use in 1839–1840, or for many years after; that the eel fishery was conducted without anything of the sort, and that no right, such as is claimed by the defendants, passed under the grant from the De Burgho estate to the Shannon Commissioners, or was acquired by the latter under their statutory powers. I am, however, satisfied that for a period which must be very nearly forty years, and which may be taken to be forty years in the absence of proof to the contrary, the existing tanks and their predecessors, including the cisterns, have been used in connexion with the eel fishery very much in the same manner as at present: though I am also satisfied that the user has been a growing one, expanding with the increase of the fishery itself; and that the present tanks constitute a greater interference with the proprietary rights in the river than was occasioned by anything done forty years ago. I should notice in this context the case of *Lord Antrim* v. *Dobbs* (1), following *Dand* v. *Kingscote* (2), and other authorities. These were all cases of express grant; and the Courts, construing the grant as of a reasonable way-leave, held that it was in each case a question of fact whether a new and improved kind of way was or was not reasonable. These cases have no application to a case of implied grant, where the implication can only arise from actual user; nor to the question of prescription, because there again the acquired title must be the thing actually enjoyed. *Weld* v. *Hornby* (3) was the case of alleged prescriptive title to an easement. The owner had altered a weir made of brushwood into a stone weir, and it was held that this was a greater interference with the fishery of the plaintiff than could be justified.

If it had to be done, it would be difficult in the extreme now

(1) 30 L. R. Ir. 424. (2) 6 M. & W. 174. (3) 7 East, 195.

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to define exactly what was the state of things in (say) 1857; but, apart from a circumstance I shall have to allude to in another connexion, no one has objected till now to this increased user, and it may be that there is thus evidence of the right to use as many tanks or cisterns at the place in question as the lessees of the fishery needed from time to time. If the full period of forty years is not covered, there is, in my opinion, an enjoyment for a sufficient length of time to justify the inference of a lost grant in order to explain and quiet the possession. The statutory period of twenty years, though pleaded, was not relied on, because Sir R. De Burgho, who was owner in fee of his estates under a disentailing deed of 1842, died in 1873, having by his will put the estate in settlement, leaving Lady De Burgho, who died in 1896, a life estate, with remainder to the only son of John Wallis, if living at her death, as was the case; but if he should die in her lifetime, then to the heirs, &c., of Lady De Burgho in fee. There was thus a life estate which would have prevented the twenty years' period from binding the inheritance. This consideration does not apply to the period of forty years, because the saving in sect. 8 of the 2 & 3 Wm. 4, c. 71—whether or not the word "convenient" is to be read as merely a mistake for "easement," or as an equivalent for "convenience," and so including easements—only enures for the benefit of a person entitled to the "*reversion*" expectant upon the determination of the life estate; and the word *reversion* is to be strictly construed in this context, and will not include a remainder (*Symons* v. *Leaker* (1); *Laird* v. *Briggs* (2)).

So much for the question as to the time of enjoyment. The character of it is a different question. There is in the evidence for the plaintiff, if it be believed, proof that the enjoyment by the defendant was permissive merely, and also that, in 1869, a transaction occurred which shows that this was acknowledged. That transaction was deposed to by Walsh, and was somewhat as follows:—It would appear that Enright had made himself obnoxious to the DeBurghos by having given unacceptable testimony in a case in which they were some way interested, and this man

(1) 15 Q. B. D. 629. (2) 16 Ch. D. 440; 19 Ch. D. 22.

Walsh went down, with others (including the agent Corbett), and insisted on Enright's dismissal, and which the partners agreed to do, and accordingly they did dismiss him. And not only was there violent language used, but Corbett threatened to cut the moorings and let the boxes float down the river, unless Enright was got rid of; and the party went armed with an axe and other tools adequate to carry out this purpose. And not only did the partners not say, "We are not your lessees of the fishery at all; but we are tenants of the Commissioners of the Board of Works, and we have a right to use the tanks," but they said, "What are we to do? We must dismiss him, even if it be at some pecuniary loss." A different colour is given to the transaction by the witnesses for the defendants.

The other evidence given by Walsh was as to the payment of rent which, it is alleged, took place while Lady De Burgho was tenant for life. She had for some reason severed her connexion with her agent Corbett, and there is some evidence that she acted as her own agent for some time; and Walsh says that he received rent in respect of the tanks, paid to him for Lady De Burgho by Hartigan, the amount being 15*s.* a-year, that is 5*s.* for each partner—a curious way of assessment. Still, I am not disposed to discredit it, and I believe that something of the kind did take place. Further, Mr. Ingham states that he at times lived at Enright's Hotel, Enright being one of the tenants of the fishery, and that over and over again the statement was made by Enright to him that rent was paid for the use of the boats or boxes.

I do not see my way to disbelieve these statements; but they were contradicted, and I should prefer not to decide the case upon them, having regard to the fact that there is no written confirmation as to any of them, and that slight variance in the language stated to have been used on the different occasions would give the whole thing a different colour.

Assuming, then, that the right claimed, or any of the rights claimed, by the defendants, has been shown to have been exercised for forty years as of right, or to have been enjoyed so long as to give rise to the presumption of a grant now lost, how does the case stand in view of the conveyance by the Land Judge to the plaintiff?

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I have already said that I do not think the easement claimed could have passed, or did pass, by the words of the conveyance or award of 1840. It is in no sense a part of the fishing. The fishing is concluded before the eels have been placed in the tank, which is simply a store for preserving fish previously caught. It is used for months after the fishing season is ended. Take the evidence of Mr. Moore who was called at the end of the defendants' case. He is part owner and manager of the Erne Fishery near Ballyshannon, and gave his own experience of the working and management of that eel fishery. He says, "We use storing tanks of this kind; the fishery could not be successfully used commercially without them. If the eels were put on the market in a lump the price would at once come down. It is the habit to keep them till April (the fishing season ending in January). They would be 5½*d.* or 6*d.* at present, and I have known them rise to 11½*d.* in April." That is to say, the fishery could not be successfully carried on as a commercial undertaking without the tanks, and Mr. Ingham really says the same thing.

Though in one sense—as admitted by the plaintiff—it is necessary to store the eels in some such way, the necessity is a financial one merely, and is needed, not for the catching of the fish, or even for the securing of them when caught, but mainly in order to avoid glutting the market by sending in at once the whole produce of, it may be, an abnormally large draught of fishes. There is nothing to prevent all the fish being taken away in boats and sent direct to Limerick or elsewhere each day. The Shannon at the place in question is a public highway. If tanks are needed for commercial success in the conduct of the fishery, there is no reason why they should be where they are rather than (say) on the other side of the river, or in some other stream, if the defendants chose to buy the right elsewhere. In this sense they are not a necessary adjunct, much less an integral part, of the fishery. They are rather part of the arrangements in connexion with the dealing in fish after capture.

The conveyance of December, 1896, grants all the bed and soil except the sites "of certain eel weirs acquired in 1838 by the late Shannon Commissioners." This is strictly an exception and not a reservation. The sites are not granted and then reconveyed,

but they never passed to the plaintiff at all. So with the fishings; the conveyance grants "the several and exclusive right of fishing for all manner and kinds of fish of and in the waters flowing over the bed and soil aforesaid, save and except the eel fishings so acquired as aforesaid."

There is therefore no question of re-grant. The plaintiff got all the bed and soil, and all the fishing, except the sites of the weirs and the right of fishing for eels; and what he got, he got absolutely, save as expressly or inferentially mentioned.

If either by force of the grant to the Shannon Commissioners, or by virtue of the exception in the Land Court Conveyance, or by a grant now lost, the right in question had been or could have been acquired by them, it was still, in my opinion, an easement. In *Pyer* v. *Carter* (1) it was held that by a grant of a house the right to have drains, which existed at the time of the lease in land not granted, passed as part of the subject-matter—that is the house demised—though not mentioned. But the right is spoken of throughout the case as an easement. So in *Ewart* v. *Cochrane* (2), a Scotch case, where a somewhat similar question arose, the right is described as an easement. Obviously a right of this sort, whether forming part and parcel of what is granted or not, must, in law, be an easement to be exercised by a dominant over a servient tenement. How then is the effect of the Land Judge's conveyance which grants the servient tenement without mention of the servitude to be escaped?

In two ways say the defendants. First, by the case of *Hamilton* v. *Musgrave* (3).

Second, by the 34th section of the Land Purchase Amendment Act of 1896.

*Hamilton* v. *Musgrave* (3) (erroneously printed as "*Musgrove*" in the report) was a peculiar case. Messrs. Musgrave purchased portion of the Conolly estate in Donegal in the Landed Estates Court; and got a conveyance of the lands which were stated to be bounded by the river Glen; and in the conveyance there was no reference to any right of fishery in anybody, but the lands were conveyed subject to the rights of the public in certain roads mentioned, and

(1) 1 H. & N. 916. (2) 4 Mac Q. 117. (3) Ir. R. 6 C. L. 129.

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subject also "to the rights of all parties in respect of Lough Auva, &c.," and "in respect of the Glen river forming the eastern boundary." Mrs. Hamilton was the plaintiff, and she brought an action for the purpose of establishing her right to a several fishery in the river Glen adjoining the lands of the defendants: and the Court of Common Pleas decided that the execution of the conveyance had not the effect of extinguishing the several fishery. The question turned mainly on the words of the Landed Estates Court Act, which provides in section 61 that "every such conveyance executed as aforesaid by the said Judge purporting to pass an estate in fee-simple shall be effectual to pass the fee-simple and inheritance of the land, subject to such charges, tenancies, rights of common or other easements . . . . as may be expressed or referred to therein as aforesaid, but save as aforesaid, and as hereinafter provided, discharged from all former and other estates, rights, titles, charges, and incumbrances whatsoever." The chief legal difficulty was the question as to whether the reference to the easements in the Landed Estates Court conveyance was to be interpreted as a reference to the several fishery (see p. 137 of the report) which was not in law an easement at all. Monahan, C. J., says (p. 135), "The defendants further relied upon a conveyance from the Landed Estates Court, of the 26th November, 1868," and he states the sale, and says (p. 137), "What is the meaning of the rights of 'easement' which are to be secured? I quite agree that in strict legal language a right of fishing is not an easement. For the existence of an easement, properly speaking, there must be two tenements, a dominant and a servient tenement," and so forth. And he decides that there was such a reference to the right of fishery in the Landed Estates Court deed as, notwithstanding the execution of the conveyance, enabled Mrs. Hamilton still to maintain her right to the several fishery, although it was not expressly mentioned.

It would be waste of time to quote the memorable judgment of Christian, L.J., in *Tottenham's Estate* (1), or the decision of the House of Lords in *Rorke* v. *Errington* (2) as to the construction and effect of a conveyance under the Landed Estates Court Act, 1858.

(1) I. R. 3 Eq. 528. (2) 7 H. L. C. 617.

That Act is now the charter of many if not most Irish titles. All the estates that have passed through the Court for now nearly forty years, and all the money that has changed hands on judicial sales have been acquired on the faith of the absolute impregnability of the titles conferred by the Court. It has always been held as simply unquestionable that a judicial sale by the Landed Estates Court passed everything expressed or referred to, and nothing not so expressed or referred to: and that what was granted was absolutely freed from all equities, charges, and easements not stated on the face of the deed. In one point of view, *Hamilton* v. *Musgrave* (1) does not contravene this principle, because there, on the face of the conveyance, it was manifest that *some* rights connected with the river Glen were not intended to pass, and the Court held that there was thus a reference to the several fishery of the Hamiltons, as if it had been an easement as to which the purchaser ought at least to have inquired. Whether the decision was right or wrong (and the main controversy there was whether a several fishery could be aptly described as an easement), it does not apply to the present case where the conveyance is made expressly subject to all rights of way, but is not made subject to any other easements whatever. As I have said, in the case before me the question does not arise upon a reservation operating by way of re-grant, but simply upon a conveyance subject to an exception, that is, something not comprised in the grant at all, viz.:—the sites of the eel weirs, and the fishing for eels. In my opinion the case is closed by the Landed Estates Court deed, unless the Land Law (Ireland) Act of 1896 has the operation contended for by the defendants.

When Mr. Fitzgerald applied to me for liberty to the Board of Works to intervene in the action, he based the application mainly upon the intention to raise this point. The 34th section of the last-mentioned Act (59 & 60 Vict. c. 47) is as follows:—"A holding vested in a purchaser by a vesting order under this Act shall continue to have appurtenant thereto and to be subject to, as the case may be, any previously existing easements, rights, and appurtenances and any privilege previously in fact enjoyed,

(1) I. R. 6 C. L. 129.

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whether by permission of the landlord or otherwise, in such manner and for such time that, if the holding had belonged to a different owner from the rest of the estate, it would have been an easement or right, shall be an easement or right within the meaning of this section, and shall be appurtenant to or exerciseable over the holding, as the case may be.

(2). "The vesting order may, if the Land Commission think fit, declare that the sale is made subject to or free from any particular easement, right, or appurtenance, and such declaration shall have full effect.

(3). "This section shall extend to any sale or declaration of title made by the Land Judge in pursuance of the Landed Estates Court (Ireland) Act, 1858, in like manner as if it were herein re-enacted with the necessary modifications."

The contention is that this sub-section 3 in effect repeals the Landed Estates Court (Ireland) Act, 1858, so far as concerns the duty of that Court to ascertain easements, &c., and to convey discharged of such as are not mentioned or referred to, and that this repeal extends to all cases and all sales whatever made after the passing of the Act. It might be sufficient to say that even if that were so, it does not apply to this case, because the Act came into operation on the 14th August, 1896, and the sale took place on the 26th June, 1896, although the conveyance was not executed till the 11th December, 1896. It cannot be that the Court was bound to inquire into and declare easements, tenancies, &c., for the purpose of this very sale; to receive the purchase-money for the premises so ascertained, and then to convey something materially different. That would be a manifest fraud. The "sale" is of course recognized by the Act and Rules as something distinct from the conveyance. On payment of his purchase-money on the 2nd July, 1896 (which was prior to the passing of the Act) Mr. Ingham was equitably entitled, as between himself and the Court and every one else, to the whole interest expressed in the rental under the law as it stood. The easements it must be presumed had all been inquired into, or, at least, all adjoining owners, including the Board of Works, must have had notice and been invited to set forth their claims, if any. This interest he bought and paid for; and he was entitled to have his conveyance at once.

It is impossible to hold that the delay in discharging what is really a ministerial duty, viz.—the execution of the deed by the Land Judge—can have robbed him of what was his.

But has the sub-section any application whatever to cases such as the present?

In my opinion it is perfectly plain that it has no such application. This conclusion is more easy than it is to say what exactly the sub-section does mean. "This section shall extend to any sale or declaration of title made by the Land Judge in pursuance of the Landed Estates Court (Ireland) Act, 1858, in like manner as if it were herein re-enacted with the necessary modifications." What is meant by "it"? Grammatically it should mean "any sale or declaration of title made by the Land Judge," &c. But that cannot be the meaning; because you can't "re-enact" a sale. It cannot mean "this section": for you cannot re-enact a section in the very section itself. If, contrary to grammar, "it" means the Landed Estates Court (Ireland) Act, 1858, what is the meaning of "in like manner as if it were herein re-enacted"? What is the meaning of "re-enacting" an Act of Parliament which is in full force? And if the meaning be that some provisions of that statute are to be re-enacted, what is meant by "with the necessary modifications"? It is not stated that any modifications are necessary: nor is it easy to conjecture, consistently with imputing to the Legislature that wisdom which the Common Law attributes to it, what can have been aimed at by this fantastic specimen of draftmanship. But, if one be driven to apply to the construction of this enactment the rules which have to be resorted to in order to construe the crude expressions of ignorant testators, we may suppose that something like the following may have been intended. The section, apart from this 3rd sub-section, is limited strictly to the case of "holdings" within the Land Acts and Amending Acts and Land Purchase Acts. It is applied in terms to cases where there is a "landlord" of the holding. The "owner of the estate" is spoken of. The section occurs in an Act forming part of a code dealing with Land Act tenancies alone. There is not the faintest trace of any intention to revolutionize the practice in dealing with Irish titles in the bulk or to repeal the Landed Estates Act; and to abolish in all cases of sales in the Landed

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Estates Court the law of England. For, if the effect of this clause were to apply the provisions of the 34th section to all sales—say to the present—then, not alone would properties be sold subject to easements, rights, &c., not mentioned or referred to, but things which were not and never could be easements at all, such as "privileges previously, in fact, enjoyed by permission," would be fastened upon holdings, even when such so-called "holdings" were not holdings within the meaning of the Act at all, but estates in fee-simple.

Whatever sub-section 3 means, it cannot have meant that. Implied repeals, we are told, are not favoured, because they are a reflection upon the learning and wisdom of the Legislature. If not precisely upon that ground, I decline to hold that the Landed Estates Act, 1858, sect. 61, is impliedly repealed by this sub-section. I think it was intended by whoever drew the clause (and probably it was introduced as an amendment) to apply the provision as to easements, &c., to cases of the sale of "holdings" strictly so called, that is, holdings to which the Land Acts apply, even when carried out through the Landed Estates Court. This will explain the phrase "with the necessary modifications."

If, however, I am asked to explain, on that hypothesis, what is the force of the words "or declaration of title," I can only say that I am unable to do so. Some attempt was made at the bar to place a rational meaning on them. I failed to grasp it. The unintelligibility of the language used, however, ought not to be a reason for straining or striving to apply it to cases to which it is manifest it was never intended to reach.

On the whole, I am of opinion that even if the defendants had succeeded in showing that they had title to an easement such as they claim, that easement was extinguished by the plaintiff's Landed Estates Court conveyance: that the acts complained of are trespasses, and that they must be restrained by injunction.

Solicitors for the plaintiff: *Whitney & Moore.*
Solicitor for the Commissioners of Public Works: *Sir P. Coll.*
Solicitors for the defendant Mackey: *Blackall & Son.*

R. W. L.

## MACONCHY *v.* CLAYTON.

(1897. No. 334.)

*V.-C.* 1897. June 16, 24, 25. — *Appeal.* Nov. 17, 18.

*Vendor and purchaser — Contract in letters — Subsequent correspondence — Want of title — Fee-farm grant — Root of title — Title to converted leasehold — Refusal to make title — Breach of contract — Discharge of purchaser — Rescission.*

By letters of the 6th February, 1897, C. offered to purchase M.'s interest in certain lands, subject to title to the satisfaction of C.'s solicitor, the purchase to be concluded on the 25th April, and M. accepted the offer. The premises were held under a fee-farm grant, dated the 21st August, 1852, and made pursuant to the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105). On February 11 M.'s solicitors sent to C.'s solicitor a draft agreement for sale, which provided that the title should commence with the fee-farm grant. C.'s solicitor declined to have this agreement executed, alleging that the letters were the contract; he, however, agreed to waive proof of the grantor's title. A correspondence ensued in which C.'s solicitor called for an abstract of title; M.'s solicitors replied that if C. would accept title on the basis of the draft agreement they would furnish it, but that M. would not make further title. On February 22 M.'s solicitors sent the abstract stating "it is distinctly understood that no title prior to the fee-farm grant . . . is to be required." C.'s solicitor, replied "in reference to the understanding . . . I don't seek to investigate the title of the grantor," and on March 1 he furnished requisitions, one of which required that the grantee's title to the leasehold interest should be shown. Replies were sent on March 5 stating, amongst other matters, that it had been expressly stipulated that no enquiry should be made behind the grant. C.'s solicitor would not accept this, and on March 10 M.'s solicitors wrote that if C. would not accept the title as stipulated in his previous letters, the matter could not proceed further: the letter concluded—"Please let us know as soon as possible whether your client will proceed or not." On March 13 C.'s solicitor wrote that the title was not a marketable one, and that without it C. refused to go on with the sale, concluding, "so nothing remains but to send you particulars of my client's costs." M.'s solicitors replied that from the first they had intimated that title would not be shown prior to the grant, adding, "We shall, however, make further enquiries, and we might be able to find some document.' On the 16th they again wrote saying they had procured a deed which mad the matter perfectly clear, and they would send a copy. C.'s solicitor answere that as M. had declined to carry out the agreement, he had, on receipt of the letter of March 10, written to C., stopping a sale of her house, and saying that

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the contract was off. On March 16 a copy of the deed showing the prior title was furnished, but C. refused to complete, and her solicitor returned all documents, and furnished his costs to M.'s solicitors. They thereupon wrote declining to admit C.'s right to terminate the contract. In an action by M. for specific performance :—

*Held*, by the Vice-Chancellor, that the contract was to be found in the letters of the 6th February; that, having regard to sect. 7 of the Renewable Leasehold Conversion Act, the fee-farm grant could not be relied on as the root of title ; that C. was justified in her requisition as to the prior title, and that her solicitor had not waived her right to evidence of same. But, that a rescission of the contract could only be by a new contract, showing in clear and unequivocal terms that both parties had agreed to rescind the contract for sale ; that the letters of the 10th and 13th March had not that operation ; that C. had not, under the circumstances, prior to the 25th April, a right to rescind the contract; and that M. was entitled to specific performance provided good title could be made.

On appeal, *held* (reversing the decision of the Vice-Chancellor), that by the contract the vendor was to give a marketable title to the lands, that by their letter of March 10 the vendor's solicitors declared his incapacity to fulfil this part of the contract, and renounced the same, and the purchaser, having by her solicitor's letter of March 13 elected to treat this letter of March 10 as a breach of the contract, was thereby discharged and released from the contract, and was not liable specifically to perform the same.

ACTION for specific performance of an agreement to purchase certain lands and premises.

The statement of claim was as follows :—1. By letters dated respectively the 6th February, 1897, and 19th February, 1897, the plaintiff agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff, the lands and premises known as Kilvare, otherwise Brickfield, and the field adjoining called the Strand, Templeogue, in the county of Dublin, held under fee-farm grant dated the 21st August, 1852, and part of the lands of Templeogue aforesaid held under lease for ninety-nine years, dated the 20th March, 1873, with the dwelling-house and buildings thereon for the sum of £1850, subject to the plaintiff showing a good and marketable title thereto, the defendant agreeing not to require the plaintiff to prove the title of the grantor or lessor in the said fee-farm grant and lease, the purchase to be completed on the 25th April, 1897. 2. The plaintiff duly furnished to the defendant long prior to the date fixed for completion of the purchase a good and marketable title to the said lands and premises pursuant to the

said agreement, and all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to have a performance of the said agreement, and to maintain this action for the breach thereof, and the plaintiff was and is ready and willing to perform the said agreement on his part; but the defendant has refused and still refuses to carry out the same.

The defence was in the terms following:—The defendant says that:—1. She did not enter into the agreement alleged, or any agreement. 2. In the alternative, the defendant says that the contract (if any) between her and the plaintiff consisted solely of three letters (R. H. Beauchamp to plaintiff, plaintiff to R. H. Beauchamp, and R. H. Beauchamp to plaintiff), each dated the 6th February, 1897; that under the contract, consisting of the said three letters, the plaintiff was bound to show a good and marketable title to the property agreed to be sold to the satisfaction of her solicitor: that the title shown by the plaintiff was not such as the defendant was bound to accept, by reason of the fact that the plaintiff failed to show that John Edmond Roach, the grantee in the fee-farm grant of the 21st August, 1852, under which part of the said premises was held, was at the date thereof entitled legally and beneficially to the interest in the lease for lives renewable for ever thereby converted; that the plaintiff prior to the 13th March, 1897, refused, and clearly and unequivocally by a letter of his solicitors declared, that it would be impossible for him, to carry out the said contract; that the defendant in consequence became entitled thereupon to rescind the said contract, and by a letter from her solicitor dated the 13th March, 1897, addressed to the plaintiff's solicitors, did rescind same, and altered her plans and arrangements accordingly. The defendant submits that inasmuch as the plaintiff failed to furnish a good or marketable title to the premises, and declared his inability to do so, she was justified thereupon, and without waiting for the day fixed for completion, in rescinding the said contract, and that under the circumstances aforesaid the plaintiff cannot now compel her to carry out the said contract, and that this action should be dismissed with costs.

The case turned principally on the correspondence, the material portions of which are as follows:—

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Letter, R. H. BEAUCHAMP (defendant's solicitor) to PLAINTIFF—Feb. 6, 1897.

Mrs. Clayton has been in communication with you about the purchase of your interest in Kilvare and Templeogue Cottage and lands, and she has received particulars of same from Messrs. Jones & Sons, agents, and the price has been agreed to. She has now instructed me to act for her, and to have the matter carried out; therefore, I am directed on her behalf to offer you the sum arranged, viz. £1850, for your interest in both the above, subject to title to my satisfaction; the purchase to be concluded on the 25th of April next.

Please let me hear from you as to this, and the name of your solicitor, who will furnish me with the particulars to enable the matter to be carried out.

Letter, PLAINTIFF to BEAUCHAMP—Feb. 6, 1897.

I am in receipt of your letter of this date relative to Mrs. Clayton's purchase of my interest in "Kilvare," and lands and cottage of Templeogue. I agree to the price, eighteen hundred and fifty pounds, with the understanding that Mrs. Clayton pays Messrs. Jones the house agents' fees; this Mrs. Clayton can tell you was what we agreed on. I have seen my solicitors, Messrs. Maunsell & Darley of Stephen's-green, and asked them to communicate with you.

Letter, BEAUCHAMP to PLAINTIFF—Feb. 6, 1897.

I received yours and am much obliged. It was my mistake not putting in that Mrs. Clayton agrees to pay Messrs. Jones the fees in relation to the sale, as agreed.

Letter, MAUNSELL & DARLEY (plaintiff's solicitors) to BEAUCHAMP—Feb. 6, 1897.

Mr. Maconchy has handed us your letter of this date, stating that Mrs. Clayton had agreed to purchase above at the sum of £1850. We shall furnish you with draft agreement for sale on Mr. Maconchy's behalf in a few days.

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Feb. 11, 1897.

We now send herewith draft agreement for your approval on behalf of the purchaser.

The draft agreement recited a lease of the 18th February, 1760, Cooper to Sandford, of Kilvare, or Brickfield, with a small field adjoining, for three lives renewable for ever, which was by indenture dated the 21st August, 1852, Nicholson, Bell, and Beatty to John Edmond Roach, converted into a fee-farm grant; a lease dated the 20th March, 1873, Domville to the said Roach of

part of Templeogue for ninety-nine years; a conveyance of the 10th April, 1883, from Roach to John S. Maconchy of the former's interest under the grant and lease of 1873; the death of John S. Maconchy without having disposed of his interest in the premises, leaving the plaintiff his heir-at-law, to whom also administration was granted. It then contained an agreement for sale and purchase, and provided (amongst other things) that the title to the premises in the fee-farm grant and lease should commence with those documents respectively, and that the purchaser should not require any evidence of the grantor's or lessor's title to make the same or any other evidence whatever of any title thereto prior to the dates thereof.

On the 15th February, 1897, Mr. Beauchamp had an interview with Mr. Maunsell: [see the oral evidence, *post*, p. 301].

The correspondence was continued as follows:—

Letter, BEAUCHAMP to MAUNSELL & DARLEY—Feb. 16, 1897.

My client was here to-day enquiring what progress had been made in the matter. Would you kindly furnish the title at your early convenience. As I told you at our interview, though I cannot advise my client to sign a more extended agreement than that already entered into, yet I have no wish to raise any unreasonable objection of any kind against your client's title, as my client is a willing purchaser.

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Feb. 17, 1897.

We are in receipt of yours of yesterday's date. Our client's title to sell is shortly set out in the draft agreement which we sent you, and if you will let us know that you will accept the title on the basis of that agreement, we will furnish you with our client's title in accordance therewith; but our client will not go to the expense of making further title than that offered.

Letter, BEAUCHAMP to MAUNSELL & DARLEY—Feb. 18, 1897.

I received yours. Your client entered into a contract with mine for the sale of his place, and he must carry it out. I cannot now agree to accept a title I don't know anything about. Please let me see the title you have. Of course your client will be responsible for any delay in completing this matter, and also in case my client suffers any damage by reason of any such refusal. Mrs. Clayton is in treaty for the disposal of the house in which she at present resides, but cannot finally agree until she knows when she will be able to have this matter with your client settled.

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Letter, MAUNSELL & DARLEY to BEAUCHAMP—Feb. 19, 1897.

We enclose copy of the agreement under which Mr. Maconchy's father purchased in 1883. We cannot go behind the two deeds of 1852 and 1873, therein mentioned, so it is useless our furnishing title till this is clearly understood; the other matters mentioned in the agreement are matters of course.

Letter, BEAUCHAMP to MAUNSELL & DARLEY—Feb. 19, 1897.

Yours of to-day with copy former agreement. I do not intend to ask you to prove the title of the lessors in the grant and lease of 1852 and 1873, so there is nothing now to prevent your furnishing the title.

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Feb. 22, 1897.

We send abstract of title and copies documents therein abstracted. It is distinctly understood that no title prior to the fee-farm grant of 21st August, 1852, and lease of 21st March, 1873, is to be required.

Letter, BEAUCHAMP to MAUNSELL & DARLEY—Feb. 24, 1897.

Your letter with abstract of title and copies received, and I shall let you have my requisitions as soon as possible. In reference to the understanding you state as to title, I may repeat what I have already stated, that I don't seek to investigate the title of the grantor or lessor in the grant or lease.

Mr. Beauchamp furnished requisitions on title, dated the 1st March, 1897, the third requisition being as follows:—

3. The vendor should prove that at the date of the execution of the fee-farm grant the entire interest of the lessee under the lease of the 18th February, 1760, was vested in John Edmond Roach.

The correspondence continued:-

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Mar. 3, 1897.

We shall send you replies to your requisitions in a day or two. In the meantime we send draft requisition for searches directed by you for your approval and thus save delay. Kindly return same at your convenience.

Letter, BEAUCHAMP to MAUNSELL & DARLEY—Mar. 4, 1897.

I return draft requisitions for search herein approved of. Kindly get the matter expedited as much as possible, as the purchasers want to arrange for the sale of the house in which they are at present living.

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Mar. 5, 1897.

We are in receipt of yours returning draft requisition for search, and we now return purchaser's requisitions on title with our replies thereto, also draft declaration of vendor referred to therein, and direction to Registrar of Deeds to permit you to inspect searches when ready.

The reply to the third requisition was as follows:—

It was expressly stipulated that no enquiry should be made behind the fee-farm grant of 1852.

The following is the continuation of the correspondence:—

Letter, BEAUCHAMP to MAUNSELL & DARLEY—Mar. 9, 1897.

I send you a copy draft of your declaration as settled on behalf of the purchaser.

As regards requisition No. 3, however, I am advised by counsel that I cannot possibly assent to the answer given by you. The only thing that I waived was any enquiry into the lessor's title in the grant and lease, but as counsel points out, the statutory fee-farm grant cannot be considered a root of title, and he considers the purchaser is entitled to evidence that John Edmond Roach was, at the date of the grant, entitled to the entire beneficial and legal interest in the lease converted by the grant, or that he became so entitled before the subsequent conveyance to Maconchy, in 1883. Without this he considers the vendor has not disclosed a marketable title, and the purchaser would consequently be prejudiced, if he closes without proof of such, in any future dealing with the property, and would not be able to sell, except under restrictive conditions.

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Mar. 10, 1897.

See your letters of 18th February, 19th February, and 24th February.

In ours of 19th we sent you a copy of the agreement under which the late Mr. Maconchy purchased the premises in 1883 from Mr. Roach, from which you must have observed that Mr. Maconchy was precluded from going behind the grant of 1852, and we have no means of doing so now. We cannot understand anything clearer than our letters to which we have referred, and if your client will not accept the title as stipulated by us in those letters, the matter cannot proceed further.

Mr. Maconchy and his father have been in possession for 14 years, and we hold the original lease and several renewals thereof as well as the fee-farm grant, and the title is perfectly good. Please let us know as soon as possible whether your client will proceed or not.

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Letter, BEAUCHAMP to MAUNSELL & DARLEY—Mar. 13, 1897.

I wrote my client on the subject of yours of the 10th inst., and asked her would she proceed with the sale, having regard to her counsel's advice that the title was not a marketable one, and that she could only sell again—which she may require to do—under restrictive conditions depreciatory of price. She has now seen me, and says that she made her offer—certainly the full market value—on the understanding that she was to get a marketable title, and without this refuses to go on with the sale.

Under the agreement with your client title was to be made to my satisfaction, which of course it has not been, notwithstanding that I made the concession of dispensing with any investigation of grantor's or lessor's title, so nothing remains but to send you particulars of my client's costs, which I shall do in a day or two.

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Mar. 15, 1897.

We merely write to say that we have not seen any such agreement as that stated in your letter. You may have mentioned something of the kind, but Mr. Maconchy, as far as we can see, merely referred you to us, and from the very first we intimated to you distinctly that title would not be shown prior to the date of the fee-farm grant. We shall, however, make further enquiries, and we might be able to find some document.

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Mar. 16, 1897.

We write to say that we found that Messrs. MacMahon & Lane acted for Mr. Roach on the occasion of the sale to Mr. Maconchy in 1883, and they have kindly had a search made, and found the conveyance to Mr. Roach in 1852: it is an absolute conveyance in consideration of £1200, so the matter is now perfectly clear; we will send you copy in a few hours.

Letter, BEAUCHAMP to MAUNSELL & DARLEY—Mar. 16, 1897.

I received yours. I showed you Mr. Maconchy's letter accepting the offer that was made, and as you declined to carry out the agreement made, and my client not being satisfied to purchase with a defective title, on receipt of your letter of the 10th inst, I wrote to her stopping a sale of her house at Beverston, and that the contract with Mr. Maconchy was off. I have now received your letter of to-day's date, and of course must see my client on the matter.

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Mar. 16, 1897.

We now send copy conveyance from Mr. Townsend to Mr. J. E. Roach, dated 12th July, 1852, which satisfactorily shows that at the date of the fee-farm grant of 21st August, 1852, Mr. Roach was entitled to the entire interest of the lessee under the lease of 1760. Will you now kindly send us draft of your client's conveyance. We expect to send you result of searches and

declaration as amended by you in a few days. The original of the deed of 1852 will be handed over.

Letter, BEAUCHAMP to MAUNSELL & DARLEY—Mar. 18, 1897.

I have seen my client as to your letter of the 16th inst., as to proceeding with the sale, but she declines to go on with the matter now.

On receipt of your letter of the 10th inst she stopped the advertisements of the sale of her present residence, and has been making enquiries as to other places to let. She has been put to considerable inconvenience and costs by reason of Mr. Maconchy refusing to carry out his agreement, in the first instance as to showing title.

I now return you all the documents you sent me, together with my client's costs in this matter, a cheque for which will oblige.

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Mar. 18, 1897.

We have received your letter of this date. You will not at present take us as admitting that your client has any legal right to terminate the contract or that you are entitled to the costs you mentioned.

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Mar. 22, 1897.

Referring to our correspondence in this matter, terminating with your letter of the 18th inst., and our reply of same date, we beg to state that we have now looked fully into all the correspondence and documents, and have arrived at the conclusion that your client is bound to complete the purchase of the above. Our contention is that according to the true construction of the agreement between our clients, as set forth in the contract disclosed by the correspondence commencing on the 6th February last, and terminating on the 24th of that month (from the costs furnished by you, you would appear to be under a very grave mistake, for instance, you quote our letter of the 6th February as stating that "we would send you abstract of title at once," whereas if you refer to the letter you will see that what we did say in our letter was that we would furnish draft agreement for sale on behalf of Mr. Maconchy in a few days, which we accordingly did on the 11th February), that our client was not bound to go into any title behind the fee-farm grant of 1852 and lease of 1873, and that your requisition that we should show that the grantee in the fee-farm grant of 1852 had an absolute estate in the lands at the date of that grant was contrary to the terms of the contract. This was the only requisition upon the title to which we have declined to accede, but not wishing that any difficulty should arise, we at considerable trouble caused a search to be made by the solicitor who, we ascertained, had acted for Mr. Roach in 1883, and procured from him the original conveyance to Mr. Roach of the premises of 12th July, 1852, of which we sent you a copy, and which entirely removed the objection of counsel to the title to which we have referred.

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Under these circumstances we have now to call upon your client to state whether she will complete the purchase, otherwise we fear we shall have to institute proceedings to compel her to do so. You will see that under the terms of your letter to Mr. Maconchy the purchase was not to be completed until the 25th of next month.

In order to avoid all necessity for litigation, and having perfect confidence in the counsel (Mr. Walker), who we believe advised on the title for your client, we propose without prejudice that a case should be submitted to him, together with full copies of all the correspondence, to advise whether under the circumstances your client is legally bound to complete her purchase. If you fully agree to this we shall with pleasure furnish you with copy of the case, a complete copy of the correspondence, which we will prepare to submit to Mr. Walker on the understanding that your client and ours will be bound by his opinion. We shall expect your reply by Wednesday next.

Letter, BEAUCHAMP to MAUNSELL & DARLEY—Mar. 24, 1897.

I received yours of the 22nd inst. On receipt of your letter of the 10th inst., I wrote to my client to see me, and I informed her that the matter was off, and that she could now look for another place, which she did, and made an offer for a place.

I saw her also as to leaving the matter to counsel, but she will not do this. She prefers to have an independent opinion for herself, and I am now sending a case for advice this afternoon.

Letter, MAUNSELL & DARLEY to BEAUCHAMP—Mar. 31, 1897.

We now return the following documents which you sent us:—

1. The abstract of title, and the seven documents therein abstracted.

2. The draft agreement which we furnished to you on 11th February last.

3. The copy agreement of 13th February, 1883, furnished to you on the 19th February last.

4. The draft requisition for registry search, and draft declaration of Mr. Maconchy, both of which were approved of by you.

5. Your counsel's requisitions on title, and our amended replies thereto, together with the copy deed of 12th July, 1852, and extract from act appearing on the registry search referred to in our replies, also our authority to inspect the registry search.

Inasmuch as all your counsel's requisitions have been fully complied with, we must ask you to furnish to us the draft of your client's conveyance, and proceed to complete the purchase in due course.

The amended reply to the third requisition was as follows:—

3. A copy of the conveyance of the premises to Mr. Roach, dated 12th July, 1852, which shows that at the date of the fee-farm grant of 21st August, 1852, he was owner of the interest under the lease of 1760, is sent. The original deed will be handed over.

Mr. Beauchamp, on the 31st March, 1897, wrote to Messrs. Maunsell & Darley:—

I have received yours, and have to return the papers. My client will not go on with the matter now, the arrangement for the purchase having come to an end.

The fee-farm grant contained a recital:—

And whereas the said John Edmond Roach is the owner of the said lease within the meaning of the Renewable Leasehold Conversion Act. . . .

Oral evidence was given, the substance of which, so far as not already appearing, was as follows:—

*Mr. Maunsell:* Mr. Beauchamp called on me on the 15th February: I had on the 11th February sent him the draft agreement; I received no reply till he called; he produced the letter of the 6th February from the plaintiff to him, which he had got stamped, and said that having had it stamped there was no necessity for any other agreement: I told him that under the terms of the agreement under which the plaintiff's father had purchased in 1883, he was precluded from going behind the fee-farm grant, that the plaintiff had no deeds before that, and that it was impossible for him to go beyond that. Mr Beauchamp said the defendant was a willing purchaser, they would give no trouble; and he requested me to furnish abstract of title; I requested him to write to that effect; he wrote the letter of the 16th February; I furnished the abstract on the 22nd; I had no other interview with him; I stated as the terms that plaintiff could not furnish any deeds before the grant, and asked him to write to me which he did. The construction I put on the letter of the 16th February was that he did not require to go behind the lease and grant. I had no authority on the 10th or 15th March to break off the contract; I did not see the plaintiff; I had authority to furnish the title.

*Mr. Beauchamp:* Mr. Maunsell asked me why I had got the letter stamped: I replied that it was the contract. I said I refused to enter into any other agreement; I said I would not be unreasonable in anything I might require; that was in reference to the new agreement which I refused. I never withdrew my right

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to have the grantee's or lessee's title investigated; defendant entered into a contract for the sale of her place, Beverston; she was leaving it and advertizing it for sale: I stopped that; I am purchasing another place for her; I refused to look at the agreement, I never read it; I wrote (19th February) "so there is nothing to prevent your furnishing the title"; I meant that I would not require the grantor's or lessor's title. I think it was the day after I wrote the letter putting off Mr. Maunsell that the defendant entered into the new agreement about a house; I believe it was the 13th—the day I wrote; I had nothing to do with that agreement; I took it that the matter was at an end.

*Defendant:* I was living at Beverston at the time of the negotiations; before this contract was broken off my husband advertized it for sale; it was put on Jones' books with a view to going to live at this place; when the contract was broken off we withdrew the advertisements, and took the place off the books; we did it at once; I have entered into a written agreement for the purchase of another place.

*Matheson, Q.C.*, and *W. M. Jellett*, for the plaintiff.

*Meredith, Q.C.*, and *Garrett W. Walker*, for the defendant.

The following were referred to:—Fry, Specific Performance (3rd ed.), pp. 471, 484; Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105) s. 7: *M'Clenaghan* v. *Bankhead* (1); *Watson* v. *Watson* (2); *Bristol, &c., Aerated Bread Co.* v. *Maggs* (3); *Bellamy* v. *Debenham* (4); *Lee* v. *Soames* (5); *Mersey Steel and Iron Co.* v. *Naylor, Benzon, & Co.* (6).

June 25. THE VICE-CHANCELLOR:—

I am of opinion that the contract in this case must be found in the three letters of the 6th February, 1897, viz. one from Mr. Beauchamp, the defendant's solicitor, to the plaintiff; one in reply from the plaintiff to Mr. Beauchamp; and the third from Mr.

(1) I. R. 8 C. L. 195.
(2) I. R. 11 Eq. 523.
(3) 44 Ch. D. 616.
(4) [1891] 1 Ch. 412.
(5) 36 W. R. 884.
(6) 9 App. Cas. 434, 438, 439.

Beauchamp to the plaintiff. These constituted a complete contract between the plaintiff and the defendant for the sale and purchase of the plaintiff's interest in the premises called Kilvare and Templeogue Cottage and lands for the sum of £1850, the purchase to be concluded on the 25th April following, the defendant to pay the house agents' fees on the transaction. This was practically an open contract; for the stipulation that it was subject to title to Mr. Beauchamp's satisfaction must be construed as meaning "reasonable satisfaction," which would not make any material difference. Under it the plaintiff was bound to make out a marketable title to the premises.

The plaintiff at once placed the matter in the hands of his solicitors, and put them in communication with Mr. Beauchamp the solicitor of the defendant. Messrs. Maunsell & Darley furnished Mr. Beauchamp with the draft of a formal agreement for the purchase, which stipulated that the plaintiff should not be required to go behind the fee-farm grant of 1852 and the lease of 1873. A long correspondence ensued as to this stipulation, which was objected to by Mr. Beauchamp, but I do not think it necessary to go through it in detail. The defendant consented to admit the titles of the grantor and lessor in those deeds respectively, but required to be furnished with evidence of the plaintiff's title to the tenant's interest in the premises comprised in the fee-farm grant anterior to the grant. In this requisition I think the defendant was in the right, as the fee-farm grant could not be relied on as the root of title, having regard to the 7th section of the Renewable Leasehold Conversion Act. The plaintiff's solicitors, however, for a considerable part of the correspondence objected to go behind the fee-farm grant, and though I cannot consider the letters of Mr. Beauchamp on the subject to be very decided as to insisting on his demand, still, on the whole, I do not consider that they amounted to a waiver of his client's right to have evidence of the earlier title.

On the 10th March Messrs. Maunsell & Darley wrote to Mr. Beauchamp as follows:—[His Lordship read the letter].

This letter shows that the difficulty the plaintiff was under as to this earlier title was that his father, under whom he derives, had in the year 1883 purchased the interest of Mr. Roach, who was

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then the owner of the fee-farm, on a contract which precluded the purchaser from going behind the fee-farm grant of 1852, and that he had not the means of doing so then. This, however, was not a sufficient answer to the defendant's requirement.

Mr. Beauchamp wrote in reply on the 13th March to Messrs. Maunsell & Darley as follows: — [His Lordship read this letter].

These two letters are relied on by the defendant as amounting to a rescission of the contract. I shall return to them presently to consider whether they can be so considered.

The following day was Sunday, and on Monday, the 15th, Messrs. Maunsell & Darley wrote to Mr. Beauchamp stating that from the very first they intimated distinctly to Mr. Beauchamp that title would not be shown prior to the date of the fee-farm grant, and concluding as follows :—" We shall, however, make further inquiry, and we might be able to find some deed."

They accordingly made inquiries and discovered in the possession of other solicitors who acted in the purchase from Roach a conveyance of the leasehold interest for lives renewable from a Mr. Townsend to Roach in 1852, conveying the whole interest for lives renewable for ever to Roach in consideration of the sum of £1200. On the morning of the 16th March they wrote to Mr. Beauchamp telling him of this, and that the matter was therefore perfectly clear. This was long within the time fixed for the conclusion of the purchase, and it was then shown beyond question that the plaintiff could make a good title.

But the defendant contends, as I have observed, that the letters of the 10th and 13th had previously operated as a rescission of the contract. A rescission of contract could only be by a new contract showing in clear and unequivocal terms that both parties had agreed to rescind the contract for sale. Now, supposing that the defendant had the right to rescind, did she state so unequivocally and conclusively, and, if so, did the plaintiff in like manner agree to this, or *vice versa*. Messrs. Maunsell & Darley's letter of the 10th March does not in my opinion amount to any such final breaking off. They state the difficulty they supposed they were in, and that if the defendant would not accept the title as stipulated in their prior letters the matter could not proceed

farther, and asked to be informed if the defendant would proceed or not. Here there is no statement that the negotiation was definitely put an end to. The reply to it is not any stronger, for Mr. Beauchamp says that the defendant had made her offer on the understanding that she was to have a marketable title, and without this she refused to go on with the sale. He then makes an untenable point that the title was to be made to his satisfaction, and that it had not; and that nothing remained but to furnish his costs. In my opinion these letters fall far short of the unequivocal and final character necessary to form an agreement to rescind, and I hold that they had not that operation.

This is not like some of the cases relied on by the defendant where a purchaser was held at liberty to break off a contract for sale, because it clearly appeared that the vendor had no possibility of conveying some material portion of the premises, the subject of the sale. Here there was no such ground, for the vendor was in possession of all the subject-matter of the contract, and had been so for fourteen years, and he had also possession of the original leases and of all the renewals of the premises subsequently converted into a fee-farm. All that he supposed he was unable to do was to show some conveyance evidencing the title prior to the fee-farm grant; and, as was conclusively proved by the result, there was no impossibility of doing so. He had, at least up to the 25th April, to make further efforts to deduce title, and within three days from the alleged rescission he had obtained the information which enabled him to perfect the evidence of his title. In the case of an ordinary open contract the vendor is entitled to a judgment for specific performance, and to an inquiry at what time he could make a good title, and if he can in such action make ou his title at any time before the Chief Clerk's certificate of title is made he is entitled to a decree. He is not bound to show he could do so at the date of the contract. The purchaser has no right to rescind at any time prior to that fixed for the completion of the sale on the ground that title has not been in fact evidenced. I am not now dealing with cases of gross delay or misconduct, or absolute refusal on the part of the vendor to perform his part of the contract. In my opinion the defendant had not a right to rescind the contract under such circumstances.

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I shall therefore decree specific performance of the contract contained in the three letters of the 6th February, provided that a good title can be made, and shall direct an inquiry whether good title can be made, and, if so, when it was first shown that such title could be made.

*Adjourn further consideration and costs.*

D. M'C. M.

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*Appeal.* 1897. Nov. 17, 18.

The defendant appealed to the Court of Appeal (Fitz Gibbon, Walker, and Holmes, L.JJ.)

*Meredith, Q.C.*, and *G. W. Walker*, for the appellant.

*Matheson, Q.C.*, and *W. M. Jellett*, for the respondent.

In addition to the authorities referred to in the Court below, the following were cited:—*Hoggart* v. *Scott* (1); *Forrer* v. *Nash* (2); *Nott* v. *Riccard* (3); *King* v. *Chamberlayn* (4); *Denny* v. *Hancock* (5).

Nov. 18.

FITZ GIBBON, L.J.:—

In this action, instituted by vendor against purchaser for specific performance of a contract for sale of lands, the Vice-Chancellor has pronounced a decree in favour of the plaintiff, provided a good title can be made, and has directed an inquiry whether good title can be made, and if so when it was first shown.

The defence is that, by the contract, the plaintiff was to show a good and marketable title, and that, before completion, he, by his solicitor, refused, and clearly and unequivocally declared that it was not possible for him to carry out the contract, and that the defendant was thereby released from the contract, and entitled to rescind the same, though the time for completion had not arrived. This defence is met by the argument that it is a plea of rescission, which can be sustained only by proof of a new contract, namely, by showing that both parties agreed to rescind.

(1) 1 R. & M. 293.
(2) 35 Beav. 167.
(3) 22 Beav. 307.
(4) W. N., 1887, 158.
(5) L. R. 6 Ch. 1.

Strictly speaking, the defence is not a defence of rescission by mutual agreement; it is rather a plea of discharge by the plaintiff of the defendant from the contract. The two things may be analogous, but they are not the same. I read from Anson on Contracts (p. 286):—"If one of two parties to a contract breaks the obligation which the contract imposes, . . . there are circumstances under which the breach will *discharge* the injured party from such performance as may still be due from him." The author adds:—"By *discharge* we must understand not merely the right to bring an action upon the contract, because the other party has not fulfilled its terms, but the right to consider oneself exonerated from any further performance under the contract—the right to treat the legal relations arising from the contract as having come to an end, and given place to a new obligation—a right of action."

Again (p. 289), he shows the nature of the breach which amounts to a discharge:—"A contract may be broken in any of three ways:—A party to a contract (1) may renounce his liabilities under it, (2) may by his own act make it impossible that he should fulfil them, (3) may totally or partially fail to perform what he has promised."

And again (at p. 295):—"When one of two parties to a contract declares that he will not perform his part, or so acts as to make it impossible for him to do so, he thereby releases the other from the contract and its obligations. One of two parties should not be required to tender performance when the other has by act or word indicated that he will not or cannot accept it, or will not or cannot do that in return for which the performance was promised. Nor will Courts hold him any longer bound."

In my opinion the facts of this case bring it within the rule thus stated. These facts appear fully from the correspondence. [His Lordship read the correspondence.]

The two most important letters are the letter of Messrs. Maunsell & Darley to Mr. Beauchamp of March 10, and Mr. Beauchamp's reply of March 13. The former refers to previous letters, and says:—"If your client will not accept the title as stipulated by us in those letters, the matter cannot proceed further." It concludes—"Please let us know as soon as possible whether your client will proceed or not." The title "as stipulated in

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those letters" was not the title which the purchaser was entitled to get. It is conceded that the third requisition made by the purchaser's solicitor, upon the title as furnished, was a proper requisition, and unless it was complied with, the purchaser could not get the "marketable title," which the contract entitled her to get. It was, therefore, open to the purchaser, on receiving this letter of March 10, to say, either "I elect to accept its terms," or "I elect to treat that letter as a breach of the contract." There was no third course. Mr. Beauchamp's reply of March 13, was an absolute election to treat Messrs. Maunsell & Darley's letter of March 10, as a breach of the contract. He points out that counsel had advised that the title offered by the letter of March 10, was not a marketable title: that his client's offer was made on the understanding that she was to get a marketable title; "without this she refuses to go on with the sale"; and he concludes with the unambiguous words—"*so nothing remains but to send you particulars of my client's costs.*" Unless there had been a breach of the contract, and an election to treat it as such, no costs could be payable by the vendor.

There was no need to keep the matter open until April 25; that date was only fixed for completing the investigation of the title, if the sale was proceeding. There would be no sense in keeping open a *locus poenitentiae* for the performance of a contract which was already broken by one party, and treated as broken by the other. "Let us know as soon as possible whether your client will proceed or not"—wrote Messrs. Maunsell & Darley: Mr. Beauchamp saw his client, and wrote in reply, as requested, that she would not proceed.

I am therefore of opinion that the purchaser was released from her part of the contract, and accordingly that specific performance cannot be decreed.

The appeal must be allowed with costs.

WALKER, L. J.:—

I concur in the judgment of the Court, that the plaintiff is not entitled to specific performance, though with some little regret, as it has transpired that he had throughout a perfectly good title to the premises which he contracted to sell.

It may well be that the parties were not *ad idem* in the earlier part of the correspondence, but I think the letters show that they were *ad idem* on March 5, the date when the vendor's solicitors returned the requisitions and their replies thereto to the purchaser's solicitor. The latter persisted in his requisition, and then came Messrs. Maunsell & Darley's letter of March 10, in which they in effect told Mr. Beauchamp that the matter must be at an end unless he consented to take the title on their terms. By this letter the vendor's solicitors put the purchaser to her election, and her election was to break off the contract, as was clearly conveyed in Mr. Beauchamp's letter of March 13.

It is admitted that if the vendor had agreed to sell something which he could not convey, owing to an absolute want of title, as in *Bellamy* v. *Debenham* (1), the purchaser might rescind, though the time for completion had not arrived. I can see no difference in principle between that case where the objection originated with the purchaser and the present appeal, where the vendor expressly refused to make title and the purchaser elected to take him at his word. The time for completion limits a period during which the parties may exert themselves to carry out the contract. To say that it is not competent to break off the contract before the time for completion has arrived, assumes that the contract cannot be discharged by mutual agreement.

HOLMES, L. J.:—

Previous to the receipt by Mr. Maunsell of Mr. Beauchamp's letter of the 9th March, the former might have been pardoned for supposing that his proposal that the title should begin with the grant of 1852, had been accepted by the latter. In the earlier correspondence Mr. Maunsell spoke of not going behind this grant, and Mr. Beauchamp had consented to accept the grantor's title.

Probably both gentlemen believed that the words used by each of them meant the same thing, and this would have been the case if the deed of 1852 had been an ordinary fee-farm grant. But as soon as it appeared that it had been executed in pursuance of the Renewable Leasehold Conversion Act, Mr. Beauchamp was advised

(1) [1891] 1 Ch. D. 412.

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that his consent did not preclude him from calling for evidence that the grantee had been entitled to the entire beneficial interest in the converted lease; and accordingly he furnished a requisition to this effect. After his letter of the 9th March, misconception was impossible. He defined therein his position with great precision, persisting in the requisition and explaining the grounds on which it was made. At the same time, he does not suggest that the contract had been broken, and seems to assume that the investigation of the title will proceed.

This letter might have been answered in different ways. I have examined the reply in vain for any expression conveying that there was still a matter for inquiry or negotiation. On the contrary, Mr. Maunsell's letter of the 10th March has all the features of an *ultimatum*; and the writer, if he did not so intend it himself, at least intended that it should be so regarded by the recipient. I cannot conceive it possible to state in clearer and less ambiguous language that, if Mr. Beauchamp persisted in the requisition, the vendor would proceed no further. I do not understand this letter to contain a proposal to rescind the contract, or an abandonment of the vendor's right to insist on its being carried out according to his own version and construction of it. The letter was an absolute refusal to do what was required, and a request to be informed whether the purchaser would proceed on that basis. Mr. Beauchamp's reply was just as definite. He refuses on behalf of the purchaser to carry out the contract on the terms upon which alone the vendor will proceed, and says nothing remains but to send the particulars of his client's costs.

Considerable confusion has been introduced into the case by discussing whether these letters amount to a rescission of the contract. The term "rescission" in its strictly legal sense is only applicable when the parties to a contract put an end to it by mutual agreement before it is broken. Here, immediately upon the despatch of Mr. Beauchamp's letter of the 13th March, the contract was broken by one or other of the parties. If he was wrong, it was broken by the purchaser, and an action for specific performance or breach of contract might have been brought against her at once. It would be a singular thing if precisely the same consequence were to be held to follow now that it is admitted

he was right. It seems clear that this admission necessarily affirms the proposition that the contract was broken by the vendor, and therefore his action must fail—a conclusion which, from an early stage of the argument, seemed to me to be inevitable.

Solicitors for the plaintiff: *Maunsell & Darley.*
Solicitor for the defendant: *Beauchamp.*

G. Y. D.

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## FOLEY *v.* ROLAND.

(1897. No. 286.)

*V.-C.*
1897.
July 10, 30.

*Lease and sub-lease for lives renewable for ever—Construction—Sub-lessee bound to accept renewal—Implied covenant.*

By lease and release of 13th and 14th August, 1790, C. demised to T. F. and W. F. certain lands for three lives, with a covenant by the lessor for perpetual renewal. By sub-lease, dated 27th October, 1814, E. F., in whom the lessees' interest in the lands had become vested, sub-demised portion of the lands to H. G. for the lives of the persons therein named, and for and during such lives as should be added, pursuant to the covenant for perpetual renewal thereinafter contained. E. F. covenanted with H. G. to obtain a renewal of the head lease on the dropping of any life, and to renew or make a new lease to H. G., so as that H. G., his heirs and assigns, might have for ever three lives in being; and in case E. F. should neglect or omit to obtain such renewal, that H. G. might obtain same in his own name in trust for E. F.

All the estate and interest of H. G. in the lease of 27th October, 1814, were vested in the defendants:—

*Held*, that, upon the true construction of the lease of 27th October, 1814, it contained an implied covenant on the part of the lessee to accept renewals from the lessor upon his obtaining renewals of the head lease on the fall of any of the lives.

ACTION for a declaration that the defendants, in whom all the estate and interest of the sub-lessee in an indenture of lease dated 27th October, 1814, had become vested, were bound to accept renewals or new leases thereof and to execute counterparts thereof to the plaintiff.

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By lease and release of 13th and 14th August, 1790, one Richard Chearnley demised to Thomas Foley and William Foley the lands of Templemichael, otherwise Ballydasoona, in the barony of Coshmore and Coshbride, in the county of Waterford, containing 98A. 3R. 19P. Irish, for three lives, with a covenant by the lessor for perpetual renewal, subject to the rent of £94 per annum of the then currency.

By an indenture by way of sub-lease, dated the 27th October, 1814, Edmund Foley, in whom the lessee's interest in the before-mentioned lease had become vested, sub-demised to Henry Prendergast Garde portions of the said lands, containing about thirty-eight acres statute, "To have and to hold the said demised premises unto Henry Prendergast Garde, his heirs and assigns, for and during the natural lives and life" therein mentioned, "and for and during the natural lives and life of such other person and persons as shall successively for ever hereafter be added to the term of this demise, pursuant to the covenant for perpetual renewal hereinafter contained, yielding and paying therefor and thereout yearly during the continuance of this demise unto the said William Foley, his heirs and assigns," the yearly acreable rent therein mentioned, which rent was subsequently fixed at £64 1*s.* 6*d.* And the said Henry Prendergast Garde covenanted for himself, his heirs and assigns, with the said Edmund Foley that he, his heirs and assigns, would at all times thereafter during the said demise pay the yearly rent when the same should become payable, and the said Edmund Foley for himself and his heirs and assigns, covenanted with the said Henry Prendergast Garde, that he, his heirs and assigns, and all persons deriving under him should at all times for ever thereafter, within the time and on the death of any life as therein mentioned, obtain a renewal or new lease of the said therein recited premises for the lives of such two persons as should be then in being, and also for the life of one other person to be named by the said Edmund Foley, his heirs and assigns, and thereupon should, at the request, cost, and charges of the said Henry Prendergast Garde, his heirs and assigns, as therein mentioned, renew or make a new lease of the said portion of the lands of Ballydasoona to the said Henry Prendergast Garde, his heirs and assigns, at the yearly rent and under the reservations,

and with the like covenants, conditions and agreements contained therein, and with the like covenants of renewal unto the said Henry Prendergast Garde, his heirs and assigns, for such two lives as should then be in being, and also for such other life as aforesaid, so as the said Henry Prendergast Garde, his heirs and assigns, might have for ever in the premises thereby demised, the number of three lives in being and undetermined, and said indenture contained a proviso that in case the said Edmund Foley, his heirs, or assigns, should neglect or omit within the time specified therein to obtain such renewal or new lease, that the said Henry Prendergast Garde, his heirs or assigns, might obtain same in his or their own name or names in trust for the said Edmund Foley, his heirs and assigns, upon the terms of his or their executing a new lease or renewal for the like time or term of the premises by said indenture now in recital demised to the said Henry Prendergast Garde, his heirs and assigns. The said indenture contained no covenant for giving up possession at the conclusion of the term.

By indenture dated the 26th April, 1833, in pursuance of the covenant for perpetual renewal, the said lands of Templemichael or Ballydasoona were demised to William Foley (in whom the lessee's interest under said indenture of the 14th August, 1790, was then vested), his heirs and assigns, for the three lives therein named, with like covenant for perpetual renewal and conditions as were contained in the said indenture of 14th August, 1790.

By indenture dated the 8th September, 1835, in pursuance of the covenant for perpetual renewal, the said portion of the lands of Ballydasoona comprised in the said sub-lease of 27th October, 1814, were demised by William Foley to the said Henry Prendergast Garde, his heirs and assigns, for the three lives named therein, with like covenant for perpetual renewal and conditions as were contained in the said indenture of lease of the 27th October, 1814.

The said William Foley subsequently died intestate, and all his interest in the said lands became vested in Robert Frederick Foley as his heir-at-law, who, by deed dated the 8th August, 1846, granted and assigned the said lands of Templemichael, called Ballydasoona, with the benefit of renewal thereof to Denis Foley, his heirs and assigns, as therein mentioned.

The said Denis Foley by deed dated the 14th of March, 1854,

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after reciting that the said conveyance of 8th August, 1846, was made to him as a trustee for Thomas Foley, granted the said lands of Templemichael called Ballydasoona, and all renewals thereof to the said Thomas Foley, his heirs and assigns, as therein mentioned.

By indenture, dated the 17th November, 1856, and made in pursuance of the Renewable Leasehold Conversion Act, Thomas John, and John Pollock (in whom all the estate and interest of the original lessor in the indenture of 14th August, 1790, was then vested), granted the said lands of Templemichael, known by the name of Ballydasoona, to the said Thomas Foley, his heirs and assigns, for ever, subject to the yearly fee-farm rent and covenants and conditions therein mentioned and contained.

Thomas Foley died on the 8th September, 1863, having by his last will devised the said lands of Ballydasoona, subject to an estate for life given to Honoria Foley (since deceased), to Frances Letitia Foley, his wife, and John Orpin, upon certain trusts, whereby the plaintiff Nelson Foley became tenant for life in possession of the said lands.

By indenture, dated the 28th July, 1892, the plaintiffs Richard Foley and William Usher were appointed trustees of the said will of Thomas Foley.

Henry Prendergast Garde died on the 27th day of July, 1841, having by his last will devised and bequeathed to his son Thomas, his interest in the lands of Ballydasoona.

The said Thomas Garde died on the 12th July, 1896, having by his last will, dated the 17th May, 1895, bequeathed the residue of his property (including the said lands of Ballydasoona) to the defendants Rebecca Roland and Richard Gifford Campion upon trust after certain payments therein mentioned for the defendant Andrew Roland, his heirs, executors, administrators, and assigns absolutely.

The said Thomas Garde was the last life in the last renewal of the said sub-demise of 27th October, 1814.

The defendants refused to accept a renewal, and by their defence denied that there was any implied covenant by the lessee in the sub-lease of 14th October, 1814, to take a renewal, or that the obligations thereby created were reciprocal, and submitted that they were not bound to accept or take out a renewal.

*O'Connor*, Q.C., and *Russell*, for the plaintiffs:—

It is clear that it was the intention of the parties that there should be a permanent interest in the lessee for ever: 1 Furlong's Landlord and Tenant (2nd Ed.), 259. The lessee is bound to accept a renewal: *Curry* v. *Stanley* (1). Here as in *Ex parte Quinn* (2), the lease contains a covenant by the lessor to endeavour to obtain a renewal of the head lease, and in case of his default the sub-lessee might obtain a renewal of the head lease.

In *Frankfort* v. *Thorpe* (3) the lessee was held bound to accept a renewal, though there was no express covenant by him to do so: *Furnival* v. *Crew* (4); *Pilson* v. *Spratt* (5); *Ward* v. *M'Roberts* (6). There was no covenant in this case for payment of fines, for there were none.

*Ronan*, Q.C., and *Sheil*, for the defendants:—

The ordinary covenant to grant a renewal will not create an obligation to accept a renewal: 1 Platt on Leases, p. 706: *Rubery* v. *Jervoise* (7). The *habendum* for the term demised is only for the original three lives.

*Curry* v. *Stanley* (1) differs from this case, for there the lessee covenanted to pay the rent during the continuance of the demise, "and every renewal thereof," and there were heavy renewal fines, with clause of entry and distress, showing that the intention was that the tenancy was to endure after the death of the *cestui que vie*. The covenant to renew was "at the request of H. P. Garde," it was optional with the lessee to request a renewal.

In *Frankfort* v. *Thorpe* (3) there was an absolute covenant for renewal, and the term was certain, viz. forty-one years.

THE VICE-CHANCELLOR:—

July 30.

This action has been brought by the plaintiffs as representatives of Edmund Foley, to compel the defendants, as representatives of Henry P. Garde, who was sub-lessee of the lands in question, to

(1) H. & J. 487.
(2) [1895] 1 I. R. 187.
(3) 2 Ba. & B. 372.
(4) 3 Atk. at p. 87.
(5) 25 L. R. Ir. 5.
(6) *Ibid.* 224.
(7) 1 T. R. 228.

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accept a renewal of the lease of the 27th October, 1814, from Edmund Foley to H. P. Garde. At the time of the grant of this lease Edmund Foley was seized of the lands under a lease for three lives, with a covenant for perpetual renewal, bearing date the 14th August, 1790, from the owners of the lands in fee-simple to Thomas and William Foley, the predecessors in title of Edmund Foley. The lease from Foley to Garde was for the lives of three persons therein named and the survivors and survivor of them, and for the natural lives and life of such other persons or person as should successively for ever thereafter be added to the term of the demise, pursuant to the covenant for perpetual renewal thereinafter contained, at the yearly rent of two guineas an acre, and the said Edmund Foley for himself, his heirs and assigns, covenanted with H. P. Garde, his heirs and assigns, that the said Edmund Foley, his heirs and assigns, and all and every person and persons who should be thereafter seized of the said premises under any grants or limitations made by said Edmund Foley, or by virtue of or under any descent from him, should from time to time, and at all times for ever thereafter, within two months after the death of each of the lives mentioned in the renewal of the head lease of 1790, and each and every such other life and lives as should, from time to time for ever thereafter, be added to the term or time thereby granted, in pursuance of the covenant for renewal therein contained, obtain a renewal or new lease of the lands for the lives in being, and the life of one other person to be named by Edmund Foley, his heirs or assigns, within the said two months, and thereupon should, at the request, costs and charges of H. P. Garde, his heirs or assigns, and upon payment of all such rents and arrears of rent as should then be due out of the demised premises, and a fine of a pepper-corn within two months after the death of each life as aforesaid, renew and make a new lease of the lands to Garde, his heirs and assigns, at and under the yearly rent and reservations, and with the like covenants and agreements contained in that lease, and with the like covenant of renewal to Garde, his heirs and assigns, for such two lives as should be then in being, and also for such other life as Edmund Foley, his heirs or assigns, should obtain such renewal for, so as that H. P. Garde, his heirs and assigns, might have for ever in the demised premises the number of three

lives in being and undetermined; and it was thereby declared and agreed between the parties that, in case Edmund Foley, his heirs or assigns, should neglect, within two months next after the death of any of the *cestuis que vies* in the lease of 1790, or of any other life or lives that should thereafter from time to time be added to the term thereof, to obtain a renewal, it should be lawful for Garde, his heirs or assigns, in his or their own name or names to obtain a new lease or renewal of the lands demised to Thomas and William Foley by the lease of 1790 in their own names, such new lease to be in trust for Edmund Foley, his heirs and assigns, upon the terms of his or their executing a new lease or renewal for the like term of the premises demised to Garde; Foley, his heirs or assigns paying to him or them all such losses, costs and expenses, as he or they should sustain by reason of obtaining such renewal or new lease over and above any rent or renewal fine or fines that might then be due by Garde, his heirs or assigns. There is no express covenant by H. P. Garde to accept renewals from the representatives of Edmund Foley.

The plaintiff contends that notwithstanding this, the defendants are bound to accept renewals, as the language of the lease shows that it was the intention on both sides that the lessee should accept renewals, and that this constitutes an implied covenant.

I had occasion recently in the case *Ex parte Quinn* (1) to consider the law on this subject, and see no reason to alter the opinion I there expressed. The question there was not the same as that now before me, but rather the converse of it, namely, whether the sub-lessee, in the absence of contract, can compel his lessor to take out a renewal of his interest for the purpose of feeding the sub-lease. I held that there is not in such cases an obligation on him to do so. But such cases, as well as cases like the present, all depend on the consideration whether an implied contract is created by the terms of the lease. In the case of *Lord Frankfort* v. *Thorpe* (2), Lord Manners held that such a contract may be implied from the terms of the lease; and he held on language not more favourable than that of the lease in the present case that there was an implied contract that the lessee would accept renewals The same

(1) [1895] 1 I. R. 187. (2) 2 Ba. & B. 372.

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question arose again in *Curry* v. *Stanley* (1) in the Court of Exchequer on a bishop's lease which contained no express covenant by the lessee to accept renewals, but the Court held that such a covenant should be implied from the terms of the lease. The terms chiefly relied on by the Court were first, that the *habendum* was "for and during such further and other terms and times as should or might be added thereto by virtue of the covenant for renewal thereinafter contained." This has its exact equivalent in the lease now before me. Secondly, the covenant for renewal, which was not in as strong terms as those here, by which Foley, for himself and all persons claiming under him, covenanted at all times for ever thereafter, within two months after the death of any *cestui que vie*, and any other life that should be for ever added to the term thereby granted in pursuance of the covenant for perpetual renewal, to obtain a renewal from the head landlord, and at the request and cost of the lessee to renew the lease. Thirdly, comes a clause similar to that on which special stress was laid by Joy, C.B., in his judgment, namely, the expression of the intention of the parties which is in these words, "so as the said H. P. Garde, his heirs, and assigns, might have for ever in the demised premises the number of three lives in being and undetermined." There is also here the proviso that in case the lessor should neglect to obtain a renewal, it should be lawful for the lessee to obtain a new lease or renewal in his own name in trust for the lessor, upon the terms of his executing a renewal to the lessee. I fail to see any material distinction between the two cases. It was sought to use the words "at the request," &c., of the lessee, as establishing that renewing was to be optional with the lessee. I do not admit the force of this argument, for the words may mean, and I think do mean, only that the lessor shall not be deemed to be in default unless upon a request not reasonably complied with. They cannot counteract the inferences from the clear and unequivocal language of the deed to which I have referred.

The cases of *Pilson* v. *Spratt* (2), and *Ward* v. *M'Roberts* (3), before Monroe, J., are also express decisions on the questions now before me. On these authorities I am clearly of opinion that

(1) H. & J. 487. (2) 25 L. R. Ir. 5. (3) 25 L. R. Ir. 224.

upon the true construction of the terms of the lease of 1814, it contains an implied covenant on the part of the lessee to accept renewals from the lessor upon his obtaining renewals of the head lease on the fall of any of the lives. I shall therefore decree for the plaintiffs as prayed, and with costs.

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Solicitors for the plaintiffs: *Terence O'Reilly & Sons.*
Solicitor for the defendants: *John Jermyn.*

T. H. M.

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## HOLMES AND OTHERS *v.* TRENCH AND OTHERS.

(1897. No. 512.)

*V.-C.* 1898. March 10, 25.

*Specific performance—Negotiations by the Board of Control of Lunatic Asylums with owner in fee for the purchase of lands—Death of owner—Claim by devisee and personal representatives for the proceeds of the sale—Conversion—Corporation without common seal—Special case—Motion for judgment—Practice.*

The Board of Control of Asylums for the Lunatic Poor of Ireland entered into negotiations with Miss H. during her lifetime for the purchase from her of certain lands, of which she was seized in fee, for the purpose of erecting a lunatic asylum thereon. Under the Act of Parliament (1 & 2 Geo. 4, c. 33) it was necessary for the Board, before they could have power to acquire any lands, to obtain an Order in Council authorising them to do so. It was not until the 3rd January, 1894, several months after the negotiations had taken place, that the Board obtained the necessary order. Between the date of obtaining the Order in Council, and the death of Miss H., which occurred on the 7th February, 1895, no further step appeared to have been taken in reference to the matter. After her death all parties were anxious to have the purchase carried out; but a question arose between her devisee and her personal representatives, whether a valid contract for the purchase of the lands had been concluded between the Board and Miss H. during her lifetime, so as to operate as a conversion of the property from realty into personalty.

The Board of Control having instituted an action for specific performance against the devisee and personal representatives of Miss H.

*Held* (on a special case stated for the opinion of the Court pursuant to Order XXXIV.), that before the Board of Control could have power to contract for the acquisition of lands, it was a condition precedent for them to obtain an Order in Council authorising them to do so; that the doctrine that a corporation

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might contract without seal for the purchase or sale of property, necessary for carrying on the business for which the corporation was created, did not apply to a case where the power of the corporation to do the act was not to come into existence unless or until a certain prescribed condition had been performed by them which had not been performed; that the subsequent obtaining of the Order in Council could not relate back so as to ratify previous negotiations, which, whether in themselves amounting to a concluded agreement or not, were under the circumstances a mere nullity, and that consequently there was no conversion of the property into personalty in the lifetime of Miss H., and that her devisee was the proper party to convey and receive the purchase-money.

Where in an action a special case is stated to have the questions therein raised decided, a motion must be made for judgment in the original action after the decision in the special case. The proper person to move is the person who has in form succeeded in the original action.

THE proceedings in this case were commenced by a writ of summons, in which the Board of Control of Asylums for the Lunatic Poor of Ireland were plaintiffs, and Henry Bloomfield Trench, Richard Studdert Reeves, and the Rev. Sir E. F. Armstrong were defendants, for specific performance of a contract alleged to have been entered into between them and Miss Elizabeth Harvey, deceased, for the sale of her estate and interest in part of the lands of Blackhall and Newtown, *alias* Knockmole, in the barony of Nethercross, and county of Dublin, and of an apportioned part (viz. the annual sum of £19 12*s.* 4*d.*) of a perpetual rent issuing out of the said lands.

Subsequently by consent a special case was stated as follows, for the opinion of the Court on the various questions arising in the suit.

1. By indenture of fee-farm grant, dated September 14, 1841, and made between Elizabeth Harvey and Constance Alice Harvey of the one part, and James Moutray Christie of the other part, the said Elizabeth Harvey and Constance Alice Harvey, in pursuance of the 6 & 7 Wm. 4, c. 99, granted part of the lands of Blackhall and Newtown, *alias* Knockmole, in the barony of Nethercross and county of Dublin, unto and to the use of the said James Moutray Christie, his heirs and assigns, subject to the perpetual yearly fee-farm rent of £318 10*s.* 9½*d.* (variable as therein mentioned), and to the observance and performance of the covenants, on the part of the grantee, and conditions therein contained.

2. Prior to the execution of the indenture next hereinafter stated, all the estate and interest of the grantors in the said fee-farm grant in the premises had become vested in the said Elizabeth Harvey, and all the estate and interest of the grantee in the said fee-farm grant in the premises had become vested in Joseph Christie.

3. By indenture, dated October 24th, 1891, endorsed on the said fee-farm grant, and made between the said Elizabeth Harvey of the one part, and the said Joseph Christie of the other part, it was agreed that if the said Joseph Christie should punctually pay a reduced rent of £249 as therein mentioned, and there should not have been any breach of the covenants on the part of the grantee contained in the said fee-farm grant, the said Elizabeth Harvey would accept such reduced rent in lieu of the said rent of £318 10*s.* 9½*d.* created by the said fee-farm grant, and it was by the said indenture further agreed that if the said Joseph Christie, or the persons deriving title under him, should pay the annual tithe rentcharge payable in respect of the said premises, he or they should be entitled to deduct the amount so paid out of the said reduced yearly rent of £249, as therein mentioned.

4. The plaintiffs are the Commissioners for the general control and correspondence, and for superintending and directing the erection, establishment and regulation of asylums for the lunatic poor in Ireland, commonly known, and hereinafter sometimes referred to as the Board of Control.

5. In the year 1893 the then Board of Control desired to acquire portion of the lands comprised in the said fee-farm grant for the purposes of a proposed additional lunatic asylum at Portrane (hereinafter referred to as the Portrane Asylum), auxiliary to the Richmond District Lunatic Asylum.

6. On the 13th March, 1893, William M. Lane, solicitor for the plaintiffs, wrote and sent to S. S. & E. Reeves & Sons, who were solicitors for the said Elizabeth Harvey, a letter, which, so far as material, is as follows, viz. :—

"GENTLEMEN,—I understand you are agents for a Miss Harvey, who is owner of the lands of Newtown, and Balheary Demesne, near Swords, in the occupation of Mr. Joseph Christie. The Board of Control contemplate purchasing the adjacent Demesne of Portrane, for the purpose of building an

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asylum, to be used as an adjunct to the present Richmond Asylum here. For the purpose of a water supply they require to take the water from the Broadmeadow River at the point 'E' on the enclosed map, and also for the purposes of reservoirs, &c., the land coloured red on map, containing some 18A. 0R. 28P."

7. On the 14th March, 1893, the said S. S. & E. Reeves & Sons wrote and sent to the said W. M. Lane a letter which, so far as material, is as follows, viz. :—

"DEAR SIR,—We received yours of 13th. Miss Harvey is absolute owner of Mr. Joseph Christie's lands, but he holds under a fee-farm grant. We have no doubt Miss Harvey would be willing to enter into an arrangement with the Board of Control, but what sum would they be inclined to give her? And shall we go into the valuation?"

8. On the 18th March, 1893, the said W. M. Lane wrote and sent to the said Messrs. S. S. & E. Reeves & Sons a letter, which, so far as material, is as follows, viz. :—

"GENTLEMEN,—I am in receipt of yours of the 14th inst. Miss Harvey has the lands required with others let to a tenant at an acreable rent under a fee-farm grant. If you will let me know the entire acreage in the fee-farm grant, and rent reserved thereby, and say what proportions you consider should be redeemed, I will be in a position to make you an offer on behalf of the Board of Control."

9. On the 20th March, 1893, the defendant, Richard S. Reeves, of the said firm of S. S. & E. Reeves & Sons, wrote and sent to the said W. M. Lane a letter, which so far as material, is as follows, viz. :—

"DEAR SIR,—We received yours of the 18th. Mr. Christie holds under a fee-farm grant, dated 14th September, 1841, the lands of Blackhall and Newtown, *alias* Knockmole, in the barony of Nethercross and county of Dublin, containing 228A. 3R. 36P., statute measure, at the reduced yearly rent of £249, which is at the rate of £1 1*s.* 9*d.* per acre statute. If you wish I can send you the fee-farm grant, or a copy of it. On the part of Miss Harvey, we are ready to advise her to take a sum for the redemption of the proportion of the head rent."

10. Upon the 24th of March, 1893, the said W. M. Lane reported to the then Board of Control that the said Elizabeth

Harvey was willing to sell the hereditaments and premises referred to in the foregoing correspondence, and upon such report the then Board of Control authorised the said W. M. Lane to proceed to acquire the said lands from the said Elizabeth Harvey. Such authority was given by a minute initialled by Lieutenant-General Sir Richard Hieram Sankey, C.B., R.E., Chairman of the Commissioners of Public Works in Ireland, then one of the members of the Board of Control. The said minute, so far as is material, is in the words and figures following, that is to say:—

"SOLICITOR,—The recommendation at the marked part" (referring to the report of the Solicitor, the marked portion of which is immaterial) "is approved, and proceed at the same time as regards the acquisition of the lands."

11. On the 22nd of April, 1893, the said W. M. Lane wrote and sent to the said S. S. & E. Reeves & Sons a letter, which, so far as material, is as follows, viz.:—

"Portrane Asylum, and the 18A. 0R. 28P. proposed to be taken from Miss Harvey.

"GENTLEMEN,—Referring to previous correspondence, I am prepared without prejudice to advise the Board of Control to pay your client the sum of £560 for her estate and interest in the above, she reducing the rent under the fee-farm grant by an annual sum of £19 12*s.* 4*d.*"

12. Upon the 4th of May, 1893, the said Messrs. S. S. & E. Reeves & Sons wrote and sent to the said W. M. Lane a letter which, so far as material, is as follows, viz.:—

"DEAR SIR,—We received yours of the 22nd ult. and 2nd instant" (the latter was only a reminder). "We shall advise Miss Harvey, who is abroad, to accept your offer of £560 for the purchase of part of Mr. Christie's holding, held by him under the fee-farm grant."

13. On the 20th of May, 1893, the said Messrs. S. S. & E. Reeves & Sons wrote and sent to the said W. M. Lane a letter which, so far as material, is as follows, viz.:—

"We have now received Miss Harvey's instructions to accept your offer of £560 and £12 costs. Please let us know if we shall send you abstract of title."

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14. On the 11th August, 1893, the said Messrs. S. S. & E. Reeves furnished to the said W. M. Lane, at his request, an abstract of the said Elizabeth Harvey's title to the said premises, and on the 18th August, 1893, the said W. M. Lane wrote and sent to the said Messrs. S. S. & E. Reeves & Sons a letter, which, so far as material, is as follows :—

"GENTLEMEN,—Inasmuch as your client will have the custody of the original muniments of title, I have to request that you will be so good as to furnish me with copies of the undermentioned documents at your earliest convenience."

The documents referred to in the said letter are set out as follows, viz. :—

1. Conveyance of 26th November, 1836, The Most Rev. Richard, Lord Archbishop of Dublin to the Rev. William Harvey.
2. Copy of the Will of Rev. William Harvey, dated 26th April, 1838.
3. Copy Probate of Will.
4. Copy Deed 14th September, 1841, Elizabeth Harvey and another to James Christie.
5. Copy Conveyance 12th May, 1875, The Commissioners of Church Temporalities to Elizabeth Harvey.
6. Deed, dated 24th October, 1891, Elizabeth Harvey to Joseph Christie.

The said Messrs. S. S. & E. Reeves & Sons, on the 21st August, 1893, sent to the said W. M. Lane, as requested by him, copies of the documents on the abstract. And the abstract, together with the opinion of counsel thereon, is incorporated with this case.

15. The said Elizabeth Harvey duly made her will, dated the 13th of June, 1892, and thereby appointed the defendants, Henry Bloomfield Trench and Richard Studdert Reeves, executors thereof, and after making certain devises and bequests, devised all her lands and estates in the county of Dublin (subject as therein mentioned) to the use of the defendant, Sir Edmund F. Armstrong, for life, unless and until some event should happen whereby, if the income thereof belonged absolutely to him, he would be deprived of the personal enjoyment thereof, with divers remainders over, and the said testatrix devised and bequeathed all the rest, residue, and

remainder of her property, both real and personal, to her niece, Jessie Maria Trench.

16. The said testatrix died on the 7th of February, 1895, without having altered her said will (save by a codicil, dated the 3rd of June, 1893, which did not affect the dispositions hereinbefore mentioned), and without having revoked the same, and the said will and codicil were duly proved by the defendants, Henry Bloomfield Trench and Richard Studdert Reeves, the executors therein named, on the 1st of May, 1895, in the principal probate registry in Ireland.

17. Upon the death of the said Elizabeth Harvey, the defendant, Sir Edmund F. Armstrong, went into possession of the said lands and estates in the county of Dublin, mentioned in the said will, including the lands and premises required for the purposes of the Portrane Asylum, as hereinbefore mentioned, and is in receipt of the rents and profits of the said lands.

18. The members of the Board of Control are from time to time appointed and removed by order of the Lord Lieutenant in Council, pursuant to the power in the 18 & 19 Vict., c. 109, enabling him, but their power to acquire and hold lands is under the 6th section of the Lunacy (Ireland) Act, 1821 (1 & 2 Geo. 4, c. 33), which, so far as is material, is as follows, viz.:—

"In each and every case where an order in Council for the erection of a Lunatic Asylum shall have been made and published in the *Dublin Gazette*, as in this Act is provided, the said Commissioners for general control and correspondence shall have full power and authority to rent or purchase any houses, buildings, lands, tenements, or hereditaments, on the site or sites of which it shall be proposed to erect or maintain any such district Lunatic Asylum; and any houses, lands, tenements, buildings, or hereditaments, so rented or purchased, shall and may be conveyed to the said Commissioners or any three of them, and to their heirs and successors, in trust to and for the uses and purposes of the said district Lunatic Asylum."

19. The erection and establishment of additional asylums was authorized by the Lunacy (Ireland) Act, 1826 (7 Geo. 4, c. 14).

20. Orders authorizing the acquisition of lands for additional buildings in connection with the Richmond District Lunatic

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Asylum were made by the Lords Justices and Privy Council in Ireland on the following dates:—viz. 3rd January, 1894 (which was published in the *Dublin Gazette* of the 5th of the same month), and on the 22nd June, 1894, which was published in the *Dublin Gazette* of the same day. The said orders are referred to and incorporated with this case.

21. The Board of Control have not got a corporate seal.

22. The said Joseph Christie has conveyed his interest in the lands and premises required to be taken to the Board of Control as aforesaid, subject to the said apportioned part of the said fee-farm rent, viz. the annual sum of £19 12*s.* 4*d.*

23. The defendants, Henry Bloomfield Trench and Richard Studdert Reeves, allege that the documents and circumstances hereinbefore stated constituted a binding contract between the said Elizabeth Harvey and the Board of Control, for the sale and purchase of the premises mentioned in the said letter of the 22nd of April, 1893, at the sum of £560, and contend that they are entitled to receive the said sum, and have power, as personal representatives of the said Elizabeth Harvey, to convey the said premises to the plaintiffs.

24. The defendant, Sir Edmund F. Armstrong, is willing to consent to the said fee-farm rent being apportioned as hereinbefore mentioned, and in exercise of the powers in the Settled Land Acts, 1882 to 1890, the Lunacy (Ireland) Act, 1821, and every other power enabling him to convey the same premises to the plaintiffs for the sum of £560; but though he is willing to enter into a new contract, he denies there was any such binding contract as in the last paragraph mentioned, and refuses to recognize or perform or carry out any such alleged contract. The questions submitted for the opinion of the Court are:—

1. Was there a binding contract between the said Elizabeth Harvey, and the Board of Control for the sale and purchase of the said lands?

2. Are the defendants, Henry Bloomfield Trench and Richard Studdert Reeves, as personal representatives of the said Elizabeth Harvey entitled to receive the said purchase-money?

3. Have they power, as such representatives, to convey the premises to the plaintiffs?

*Vesey Fitzgerald*, for the Board of Control.

*Dixon* (with him *Law*, *Q.C.*), for the personal representatives of Miss Harvey:—

We contend that there was a valid and completed contract on the letters and correspondence between the Board of Control and Miss Harvey during her lifetime, and that her personal representatives are the proper persons to convey under the Conveyancing Act.

The Board of Control contracted either as individuals or as a corporation. If they contracted as individuals the executors are the proper persons to convey; if, as a corporation, they did so not as a corporation pure and simple, but only as a *quasi* corporation or a corporation *ad hoc*, i. e. for the purpose of acquiring lands. A corporation of this kind can contract for the purposes for which they are constituted, though they have neither common seal nor corporate name. Lord Blackburn in the case of *Wenlock* (*Baroness*) v. *The River Dee Co.* (1) says:—"The Legislature originally by the 6 Geo. 2, c. 30, made Nathaniel Kinderly, gentleman, his heirs, and assigns, and such persons as the said Nathaniel Kinderley, his heirs, or assigns, shall nominate and appoint, undertakers of the navigation of the river Dee. The undertakers were not in that Act in terms made a corporation, and a good deal of argument was based on the supposition that whatever they did under that Act was done by them as individuals, and whatever was given to them by that Act was given to them as individuals. This I very much doubt. I think if the servants of the undertakers had been guilty of some act of negligence, for which their masters were responsible, the person injured might have recovered judgment for damages against the undertakers, and taken in execution the undertakers' goods and lands; but I doubt very much whether he could have enforced judgment by taking Nathaniel Kinderly under a *ca. sa.*, and if the man's person could not be taken, neither could his private goods and lands. In other words, I think it at least doubtful whether the undertakers were not made a *quasi* corporation—a corporation *ad hoc*." Again, it is said in Rolle's

(1) 10 App. Cas. 354, at p. 358.

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Abridg. p. 513 :—"If the King grant land to the men or inhabitants of D, *heredibus atque successoribus suis*, rendering rent, as regards everything affecting that land, they are a corporation, but not for any other purpose." For the various powers of the Board of Control see the Lunacy (Ireland) Act, 1 & 2 Geo. 4, c. 33, incorporating 50 Geo. 3, c. 103. The Board of Control have no corporate name, but they have a perpetual succession which brings them within *Smith* v. *Adkins* (1). Mr. Lane was clearly authorised by the Board of Control to contract for them, and his letter amounted to a notice to treat under the Lands Clauses Act. A notice to treat by a corporation need not be under seal: *Smith* v. *Dublin & Bray Railway Company* (2). If a vendor refuses to sell, he can be compelled to do so: *The King* v. *Hungerford Market Co.* (3). Where the price is fixed after a demand has been made to take lands, the conversion of the property is complete, and the personal representatives are entitled: *Watts* v. *Watts* (4); *Pigott* v. *The Great Western Railway Company* (5). After notice to treat and after the price has been fixed, although not actually paid, an action for specific performance lies as against the full corporation; *Nicholson* v. *Bradfield Union* (6). The proper parties to convey are the personal representatives of the deceased: *Lysaght* v. *Edwards* (7); Conveyancing Act, sects. 4 and 30.

*C. Brady* (with him, *Stanley, Q. C.*) for the devisee Sir E. Armstrong:—

Our case is that Sir E. Armstrong is entitled as devisee of the lands to receive the purchase-money, there being no concluded agreement between the Board of Control and Miss Harvey during her lifetime, so as to effect a conversion of the property.

Before the Board of Control could have power to contract it was essential for them to obtain an order in Council; that order was not obtained until 3rd January, 1894, seven months after the alleged

(1) 8 M. & W. 362.
(2) 3 Ir. Ch. R. 225.
(3) 4 B. & Ad. 327.
(4) L. R. 17 Eq. 217.
(5) 18 Ch. D. 146.
(6) L. R. 1 Q. B. 620.
(7) 2 Ch. D. 499.

contract. Before a contract can be enforced, there must be mutuality. Where a Company issue a notice to treat, they cannot subsequently withdraw it provided the contract is capable of being enforced against them: *The King* v. *The Hungerford Market Company* (1). Could we have enforced the contract against the Board of Control prior to the 3rd January, 1894? If there is a contract between two parties it must be binding on both of them: *Crowe* v. *Menton* (2). After the date of the order in Council there was no subsequent document dealing with the matter, and, therefore, there was no new contract after 3rd January except with the devisee. Contracts *ultra vires* are not rendered good by ratification: *In re Empress Engineering Company* (3); Brice on Ultra Vires (3rd ed.), p. 633. Before the obtaining of the order in Council the Board of Control were incapable of contracting for the purchase of these lands, and had no right to enforce specific performance against Miss Harvey: Fry on Specific Performance, p. 515.

Even assuming ratification were possible, the documents showed that Mr. Lane was merely directed to negotiate as to price, and was not appointed an agent to conclude a valid and binding agreement. There was no written acceptance of the contract sufficient to satisfy the Statute of Frauds.

*Law, Q.C.*, in reply:—

We submit that the Board of Control had power to contract as individuals, and that they were personally liable, although by the absence of the order in Council they might not be responsible as the Board of Control. The contract was confirmed afterwards so as to operate as a conversion. Where there is an option in one party to convert, the conversion relates back: *Lawes* v. *Bennett* (4); *Townley* v. *Bedwell* (5); *Attorney-General* v. *Bunning* (6).

THE VICE-CHANCELLOR:—

March 25.

This case has been stated for the purpose of deciding whether the devisee or the personal representatives of Miss Elizabeth

(1) 4 B. & Ad. 327.
(2) 28 L. R. Ir. 519.
(3) 16 Ch. D. 125.
(4) 1 Cox, Ch. Cas. 167.
(5) 14 Ves. 591.
(6) 8 H. L. Cas. 243.

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Harvey are entitled to a sum of £560, the purchase money of certain premises in the county of Dublin, of which Miss Harvey was seized in fee. The plaintiffs are the Board of Control of Asylums for the Lunatic Poor of Ireland, who claim to have become the purchasers in fee of the lands in question under a contract with Miss Harvey, for the purpose of a lunatic asylum at Portrane, and the defendants Messrs. Trench and Reeves, are the executors, and the defendant Sir E. Armstrong is the devisee of Miss Harvey. All the defendants are willing that the purchase shall be carried out, but they require to have it decided who should get the purchase-money from the Board.

The question is whether certain transactions between the plaintiffs and Miss Harvey, in the months of March, April, and May, 1893, constituted a valid contract for sale to the plaintiffs, and thus operated to convert her estate in fee into personal estate.

This involves a consideration of the Act constituting the plaintiffs a Board and the powers given them thereby of acquiring land. The Board was constituted under the Act of 1 & 2 Geo. 4, c. 33, which empowered the Lord Lieutenant to appoint any number of persons not exceeding eight to be Commissioners for the general control of Asylums for the Lunatic Poor in Ireland, and gives power to the said Commissioners, in each and every case where an order of Council for the erection of a district lunatic asylum shall have been made, and published in the *Dublin Gazette*, as in the Act provided, to rent or purchase lands as sites for such asylums, and enacts that any such lands may be conveyed to the said Commissioners or any three of them, and to their heirs and successors in trust for the uses and purposes of such district asylum. The power thus given to the Board can, under the words of the Act, only arise where and after the order in Council in the particular case has been obtained by them and duly published in the *Gazette*. The power to rent or purchase is not given generally, but only in each particular case, for the purposes of the particular district asylum required, and the first step to be taken is to obtain the order for the erection of such asylum. It may or may not be approved of by the Lord Lieutenant and Council. It seems to me that, before that order is so obtained and gazetted, the Board have no authority to enter into any

contract for the purchase of the land. There is no objection to the Commissioners making all proper preliminary inquiries as to lands that appear to the Board to be suitable before applying for the order, but before the order, which is a condition precedent, their power to contract for the purchase of it does not come into existence.

The first step taken by the Board was to write by their solicitor to the solicitors for Miss Harvey, who was the owner in fee of certain land which they considered to be suitable for the proposed asylum, to inform them of the desire of the Board to purchase it from Miss Harvey. This they did by a letter, dated the 13th March, 1893. [His Lordship read it.]

To this they received a reply on the following day from the Messrs. Reeves. [His Lordship read it.]

The Board's solicitor on the 18th March, 1893, wrote to Messrs. Reeves, making inquiries as to the price &c., in order to be in a position to make an offer on behalf of the Board. Messrs. Reeves replied on the 20th March, stating the particulars required. The Board's solicitor reported accordingly to the Board on the 24th March, and a minute was made thereupon by the Board in these words. [His Lordship read the minute.]

The only portion of this referring to the present matter is "proceed at the same time as regards the acquisition of the lands," meaning the lands in question. This probably gave the solicitor of the Board authority to proceed to take whatever steps were necessary for the purpose of the acquisition of the lands, but whether it authorized him to enter into a binding contract, even assuming that the Board itself had power at that stage to contract for the purchase, is at least doubtful. It does not seem probable that a public body acting in an important transaction like this meant to delegate to their solicitor the authority to make a contract binding on the Board without more, and on any terms that to the solicitor might seem fit. The language is fairly capable of a different meaning, namely, that it was intended to authorize their solicitor to take the necessary legal steps, whether by taking under the compulsory powers of the Board, or by private contract, the preliminary to all these being admittedly the obtaining the order in Council. The solicitor appears to have taken it as giving him a general authority to purchase by private contract if possible.

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He wrote to Messrs. Reeves on the 22nd April the following letter. [His Lordship read the letter.]

I do not know what was meant by the words "without prejudice" in this letter. If they have any meaning it must have been to keep the matter open for the Board to abide by it or not, which would necessarily contemplate some further consideration by the Board, and some further act on their part to make the offer binding on them. The Messrs. Reeves replied on the 4th May, stating their willingness to recommend Miss Harvey to accept the price offered, and shortly afterwards they wrote again to say that Miss Harvey would accept it. On the 11th August, 1893, the abstract of Miss Harvey's title was furnished by Messrs. Reeves to the Board's solicitor. Some documents required by the Board's solicitor were shortly afterwards furnished, but no further steps were taken in the matter during the life of Miss Harvey. She died on the 7th February, 1895, having made her will, dated the 13th June, 1892, of which she appointed the defendants Trench and Reeves her executors, and devised her estates in the county Dublin to the other defendant, Sir E. Armstrong for life, with remainders over.

The executors now claim to be entitled to the purchase-money, if the sale be carried out, contending that these lands were by an agreement for sale entered into in her lifetime converted into personal estate. Sir E. Armstrong contends that there was no such conversion, and that he and the persons in remainder expectant on his life estate are entitled to the lands as real estate of Miss Harvey at her death.

It was not until the 3rd January, 1894, that the Board obtained the necessary order from the Lord Lieutenant in Council, authorizing them to acquire lands for the additional buildings required for this lunatic asylum. They obtained a supplemental order for the same purpose on the 22nd June, 1894. Both these orders were duly published in the *Gazette*.

The executors of Miss Harvey contend that the negotiations between Messrs. Reeves and Mr. Lane on behalf of the Board of Control constituted a complete binding contract which operated as a conversion. The defendant Sir E. Armstrong contends that they did not, and that some further act was required to be done by the Board to complete the agreement; and he also contends that

until an order in Council had been obtained and gazetted, they had no power to acquire lands, or to authorize any one to contract on their behalf for such purchase. He also submits that the subsequent obtaining of the order, though it was obtained in the lifetime of Miss Harvey, could not of itself operate retrospectively, and also that even if it could authorize the Board when they obtained it to adopt and ratify the assumed contract of their solicitor on their behalf, there was nothing done by them during Miss Harvey's life with the intention of so adopting and ratifying it. There certainly was not any such thing done by them between the date of the order and the death of Miss Harvey, so far as the case goes, nor was there any allegation by counsel in argument that there was. From the opinion I have formed on the construction of the Act, I must hold that the obtaining the order in Council was a necessary condition precedent to their making any contract binding themselves or those with whom they professed to contract. I do not think it would have been possible for Miss Harvey, before the order was obtained, to have sued the Board for specific performance of a contract to purchase these lands even if the negotiation had ripened into what would otherwise have been a concluded agreement. To work a conversion there must be a concluded agreement binding both vendor and purchaser.

It was contended that, if this negotiation did not in the result constitute a concluded agreement with the Commissioners as a corporation, it became a concluded agreement with the individual members of the Board. I cannot agree in this. All through the negotiation purported to be with the Board as a body. It was for the Board the solicitor was acting; no suggestion was ever made that the individual members of the Board were to be dealt with as purchasers, and, in my opinion, it would not have been possible to have held them liable as purchasers to complete the purchase. Was it with all the individuals composing the Board that Miss Harvey was dealing, and if not, with which of them?

It is true that a corporation may contract without seal for the purchase or sale of property necessary for carrying on the business for which the corporation was created, but still the act must be that of the corporation, whether acting as a body or through a committee or an officer, or agent having authority from them to do so. But this does not apply to a case where the corporation's power

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to do the act is not to come into existence unless or until a certain prescribed condition has been performed by them, which has not been performed. The principle of ratification cannot apply to an act which was in itself a nullity, and here, in the view I take of the statute, there was nothing existing prior to the order in Council which was capable of ratification by the Board.

The cases as to optional purchases relied on do not appear to me to affect the present question, for in them there was a present dealing with the estate containing in it a right of purchase which might be exercised within a specified time, or on the occurring of a particular event; and it was held that the exercise of the option related back to the dealing of which the option formed a part, and that therefore such dealing was to be treated as if the purchase which was optional had been absolutely agreed for at the time and formed part of the transaction. But here there was no binding contract, containing an option to be afterwards exercised, to which the so-called option when exercised could be referred back. I am therefore of opinion that there was no power in the Board to contract for the acquiring of land before the order in Council; and that the order when obtained did not in itself operate to turn the previous dealing into a binding contract.

I do not think it necessary to consider whether the transactions stated in the case, independently of the question which I have decided, would have constituted a binding contract between the Board and Miss Harvey.

I answer all the questions in the negative.

*Law, Q.C.*, for the personal representatives, moved for judgment:—

Although the decision of the Court on the questions submitted in the special case are adverse to the personal representatives, yet in form they have succeeded as against the Board of Control in the action for specific performance, and are therefore the proper persons to move for judgment: *Harrison* v. *Cornwall Minerals Railway Company* (1). *Judgment accordingly.*

Solicitors for the personal representatives: *Reeves & Sons.*

Solicitors for the devisee: *Richardson & Synnott.*

Solicitor for the Board of Control: *Sir P. Coll.* J. MAC M.

(1) 16 Ch. D. 66.

## IN RE AIKEN, DECEASED.
## BOLON *v.* GILLILAND.

(1897. No. 429.)

*V.-C.* 1898. May 10, 17.

*Will—Construction—Pecuniary legacies—Directions as to investment, accumulation, and survivorship—Residue.*

A testator bequeathed pecuniary legacies to four persons, Jane G., Matthew G., Margaret G., and Thomas G., respectively, and left the residue of his property to Thomas G. and Robert G. and their children, in equal shares. He added certain directions, with reference to the legacies, as to investment, accumulation, and survivorship:—

*Held*, that the word "legacies" could not be extended so as to include the residue, and that therefore the directions as to investment, accumulation, and survivorship applied only to the pecuniary legacies.

FURTHER CONSIDERATION.

Matthew Aiken by his will bearing date the 27th December, 1895, among other legacies concerning which no question arose, bequeathed to Jane Gilliland the sum of £200, and to Matthew Gilliland, Margaret Gilliland, and Thomas Gilliland the sum of £100 each. He left the residue of all his property to be divided equally between Thomas Gilliland and Robert Gilliland and their children. The testator then added the following directions, viz.:—"I direct that the legacies of the above-named Jane Gilliland, Matthew Gilliland, Margaret Gilliland, and Thomas Gilliland shall be invested at interest, and the interest yearly added to the principal until they respectively come of age; and in case of the death of said Jane Gilliland or Matthew Gilliland before attaining age, the legacy of the one dying shall go to the survivor, and in like manner with Margaret and Thomas." James Beattie and William Bolon were nominated executors of the will.

Matthew Aiken died on the 12th February, 1896, and on the 15th April, 1896, probate of his will was granted to the surviving executor, William Bolon, the other executor, James Beattie,

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having predeceased the testator. An order was made on the 24th June, 1897, for the administration of the real and personal estate of the deceased.

The question was, whether the directions contained in the will with reference to the pecuniary legacies, applied also to the residue.

*R. F. Todd*, for the plaintiff.

*Caruth*, for the defendant.

May 17.

THE VICE-CHANCELLOR :—

By his will the testator left pecuniary legacies to four persons, Jane Gilliland, Matthew Gilliland, Margaret Gilliland, and Thomas Gilliland, and several other legacies as to which no question arises. He left the residue of all moneys, &c., to be equally divided between Thomas and Robert, and their children, in equal shares. He then directs that the *legacies* of the above-named Jane, Matthew, Margaret, and Thomas should be invested, and the interest added to the principal till they respectively come of age, and in case of the death of Jane or Matthew before attaining age, the legacy of the one dying should go to the survivor, and in like manner with Margaret and Thomas. I am of opinion that the direction as to the investment and accumulation of the legacies to Jane, Matthew, Margaret, and Thomas, and the direction as to survivorship between these legatees in pairs apply only to these pecuniary legacies and not to the residue. I do not think that the word "legacies" here can be farther extended, as a distinction is clearly taken between the legacies and the residuary gift. Of the pecuniary legatees here named, Jane, Matthew, and Margaret were not given any shares of the residue which is expressly given to Thomas and Robert, and to their respective children; and of these Thomas was the only one who is mentioned in the directions as to legacies. The direction as to investment and accumulation cannot be severed from that as to survivorship, and it would be impossible to apply the latter to the residue.

I am of opinion that the persons to take the residue were confined to Thomas and Robert and their respective children living

at the death of the testator. Robert was excluded by his having witnessed the will, and he had no children at the death of the testator. The persons to take the residue are therefore Thomas and his four children living at the death of the testator who take it in equal fifths.

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Solicitors for the plaintiff: *J. & A. Caruth.*
Solicitors for the defendant: *A. Caruth & Son.*

J. MAC M.

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IN RE CONN, DECEASED.
CONN *v.* BURNS.
(1893. No. 175.)

V.-C. 1898. May 10, 17.

*Will—Construction—Gift of portions—Amount to be fixed by trustees—Uncertainty.*

A testator directed that the remainder of his farm, houses, and chattels, should be divided equally between his two sons, subject among other payments to the payment of a portion to each of his five daughters, to be determined by his wife and executors, according to the value of their portions of the farm and the services the girls might have rendered to the family, and in case of a daughter's share being a marriage share, according to the match she might make, all of which amount of money and times and ways of payment were to be determined by his wife and executors:—

*Held*, that the gift of portions to the daughters was not void for uncertainty.

FURTHER CONSIDERATION.

Andrew Conn, by his will, bearing date the 22nd February, 1891, disposed of the remainder of his farm, houses, and chattels, in the following terms, viz.:—"The remainder of the farm, houses, and chattels, I allow to be divided between my two sons, Andrew and William equally, subject to the following payments—(*a*) an annuity of £9 to be paid to my wife during her lifetime; (*b*) all my remaining debts due and demands; and (*c*) a portion to each of my five daughters, to be determined by my wife and executors according to the value of their portions of the farm and the services these girls may have rendered to the family, and in case of a

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daughter's share being a marriage share, according to the match she may make, all of which amount of money and times and mode of payment are to be determined by my wife and executors."

An order for the administration of the real and personal estate of the testator was made on the 27th March, 1893, and by an order dated 26th October, 1897, the carriage of the proceedings was given to the defendants Alexander Burns and Nevin J. M'Connell, the executors of the will. The question in the present proceeding was, whether the gift of portions to the daughters of the testator was void for uncertainty, or whether the amount of such portions could be fixed in accordance with the directions contained in the will by the widow and executors who had expressed themselves willing to do so.

*S. L. Brown*, for the executors of the will:—

Where the will furnishes some ground on which to estimate the amount intended to be bequeathed, the gift is not void for uncertainty: Jarman on Wills, vol. i., p. 358: *Jackson* v. *Hamilton* (1). Here the gift of portions to the children would be void save for the discretion given to the trustees to fix the amount for each child. Therefore the object of the trust is definite, and the power of the trustees to fix the amount is definite. The fund is divisible at the discretion of the widow and executors, who were selected by the testator for that purpose.

*E. Cuming*, for the plaintiff:—

The trustees have no power or discretion to fix the amount of the portions. The testator has himself laid down the standards according to which the amount was to be ascertained, viz.:—according to the value of the farm, the services the girls might render to the family, or the match they might make. The three standards are unquestionably vague.

*Brown*, in reply:—

The restrictions in the will are merely directory as to the mode by which the discretion of the trustees is to be exercised.

(1) 3 J. & Lat. 702.

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THE VICE-CHANCELLOR:—

The testator by his will directed that the remainder of his farm, houses, and chattels after payment of his debts should be divided between his sons Andrew and William equally, and subject to the payment of a small annuity to his wife for life, and of his remaining debts, and a portion to each of his five daughters, to be determined by his wife and his executors according to the value of their portions of the farm, and the services these girls may have rendered to the family, and in case of a daughter's share being a marriage portion, according to the match she may make, all of which amount of money and times and ways of payment were to be determined by his wife and executors. To these five children he bequeathed the payments as above determined by his wife and executors, at whatever time and in whatever manner they might think proper to pay them to them. The two sons contend that this gift to the five daughters is void for uncertainty, and they claim to take the subjects of the gift discharged from any liability to the portions of the daughters. This claim is in direct opposition to the intention of the testator, who made the gift to the sons expressly subject to the portions of the daughters. His object clearly was to give power to his wife and executors to determine, whenever a necessity for so doing should arise after his death, what the amount of the portions should be, having regard to circumstances which might exist at the time. The testater does not attempt to determine this himself, but provides persons in whom he had confidence to do so after his death. The gift is in itself no doubt uncertain in its particulars, but it is certain as to its objects, and also as to its subject-matter, namely, the residue of his personal estate after providing for the prior payments. This residue he intended to be divided between his two sons and five daughters by creating a charge for the daughters on the property so left to the sons. The amount of that charge he leaves in uncertainty so far as his will was itself to operate, and if he did no more, there would probably have been a difficulty in giving effect to his intention. But *id certum est quod certum reddi potest*, and the will provides for so doing by appointing his wife and executors to fix the amount. This they are willing to do, and thus to terminate the uncertainty. I therefore hold that this is

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a valid gift, and I shall act upon the determination of the widow and executors when formally made, and declare the rights of the respective parties according thereto. It was contended that the superadding certain grounds on which he wished his wife and executors to proceed in exercising the discretionary power reposed in them was in itself sufficient to render the intended gifts void for uncertainty. I cannot agree in this contention, as I think he gave them an absolute discretion, and merely pointed out the considerations which he mentions as matters to be taken into account by them when fixing the amounts of the portions.

Solicitors for the executors: *Corr & Connor.*
Solicitor for the plaintiff: *Lavery.*

J. MAC M.

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*V.-C.* 1897.

Nov. 11, 12, 20, 24.

*Appeal.* 1898.

April 19, 20, 27.

## LYTLE *v.* FOX.

(1897. No. 456.)

*Covenant to renew* toties quoties—*Purchase of superior interest by covenantor—Obligation to renew.*

A. leased to M. in 1811 for a term to expire 1st May, 1910. M., in 1828, subleased to H. for a term to expire 1st May, 1909, with a covenant, whenever he took a new lease, to renew to H. H.'s estate became vested in T., who, in 1850, subleased to K. for a term to expire 1st November, 1908, and T., for himself, his executors, &c., covenanted that when and so often as he or they should have received or obtained a renewal or new lease for any extended term he and they would grant to K. a similar new lease or renewal for such extended period, reserving six months of the term as a reversion. In 1846 A.'s representatives made a lease to D. for 999 years, at a rent to commence on the expiration of the lease to M. In 1873 the interest under that lease was, by Landed Estates Court deed, conveyed to T.:—

*Held*, by the Vice-Chancellor, and by the Court of Appeal, that K.'s representatives were entitled to a renewal from T.'s representatives for the term in the lease of 1846, less six months.

MOTION for judgment on admissions of fact in the defence.

The action was brought by Joseph H. Lytle and David B. Lytle against Henry Fox, sen., and Henry Fox, jun., to enforce

a covenant for renewal contained in a lease, dated the 28th November, 1850.

John Montgomery held certain lands abutting on May-street, Belfast, under a lease dated the 5th April, 1811, from Edward May for certain lives, and for so much of the term of ninety-nine years, from the 1st May, 1811, as should be unexpired at the death of the survivor, at the yearly rent of £14 11*s.*, late Irish currency, equivalent to £13 8*s.* 7$\frac{5}{8}$*d.*, present currency.

By lease dated the 22nd December, 1828, John Montgomery demised to Robert Hill portion of the said premises for certain lives, and after the death of the survivor for the residue then unexpired of the term of eighty-one years, from the 1st May, 1828, at the yearly rent of £20 sterling, and John Montgomery did thereby for himself, his executors, administrators, and assigns, covenant with the said Robert Hill, his heirs, executors, administrators, and assigns, that he, John Montgomery, his heirs, executors, administrators, and assigns, should and would, when and so often as he or they should or would renew or take a new lease or leases of said premises thereby demised from the heirs of the late Edward May, or those entitled to grant the same, that he or they should and would when called on by the said Robert Hill, his heirs, executors, administrators, and assigns, grant a new lease or leases of the said thereby demised premises for the full time of the said renewed lease or leases at and subject to the above rent and covenants, upon him, the said Robert Hill, his heirs, executors, administrators, and assigns, paying to the said John Montgomery two third parts of the renewal fines to be paid by the said John Montgomery under the original lease of the premises thereby demised: and the said Robert Hill did thereby for himself, his heirs, executors, administrators, and assigns, covenant with the said John Montgomery, his heirs, executors, administrators, and assigns, that he, the said Robert Hill, his heirs, executors, administrators, and assigns, should and would from time to time, and at all times thereafter, when and so often as he or they should be required so to do, accept and take a renewal of the said term and premises so agreed to be thereby granted on renewal, and should and would pay to the said John Montgomery, his heirs, and assigns, the two third parts of such fine or fines as he, the said John Montgomery, his heirs, and

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assigns, should pay on the renewal of said premises, with the remainder thereof then in his possession. This lease contained a clause permitting subletting.

The estate of Robert Hill became vested in Robert James Tennent. By lease, dated the 28th November, 1850, Robert James Tennent demised to James Kerr the premises comprised in the lease of 1828, for 58 years, from the 1st November, 1850, at the yearly rent of £30. This lease contained covenants as follows:—"And the said Robert James Tennent doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said James Kerr, his executors, administrators, and assigns, that he, the said James Kerr, his executors, administrators, or assigns, paying the said reserved yearly rent, and performing the covenants hereinbefore mentioned, shall and may peaceably and quietly have, hold, and enjoy, the said demised premises with the appurtenances during the term hereby granted, without any let, hindrance, interruption, or disturbance, of the said Robert James Tennent, his executors, administrators, or assigns, or any other person or persons claiming or deriving from or under him, them, or any of them. And also that when and so often as the said Robert James Tennent, his heirs, executors, administrators, or assigns, shall have received or obtained a renewal, or new lease for any extended term of the lease under which he now holds the said premises, he, the said Robert James Tennent, his executors, administrators, or assigns, shall and will on the application, and at the proper costs and expenses of the said James Kerr, his executors, administrators, and assigns, and on the payment by the said James Kerr, his executors, administrators, and assigns, to the said Robert James Tennent, his heirs, executors, administrators, or assigns, of such fine or foregift as may have been paid by the said Robert James Tennent, his heirs, executors, administrators, or assigns, for such new lease with legal interest thereon, or at such and the like addition to or increase of rent (if any) as the said Robert James Tennent, his heirs, executors, or administrators, may have become subject to as the consideration of said renewal lease of said premises, grant, and demise unto the said James Kerr, his executors, administrators, or assigns, a similar new lease of said premises for such extended term, reserving thereout in case the renewal shall be for years, six months of the term as a reversion

in order to preserve the landlord's remedies for recovery of the rent."

The estate of Kerr became vested in John Lytle, and he by his will bequeathed the residue of his property (which included his interest in the premises) to the plaintiffs, whom he appointed executors, and to whom probate was granted.

By an indenture, dated the 25th May, 1846, reciting five leases from Edward May of separate plots of ground—the first for lives and years, which would expire on the 1st May, 1908, at the rent of £23 17*s.* 9*d.*, Irish currency, the second for lives and years, which would expire on the 1st November, 1909, at £65, Irish currency, the third for lives and years, which would expire on the 1st November, 1909, at £93, like currency, the fourth (being the said lease of the 5th April, 1811) for lives and years, which would expire on the 1st May, 1910, at £14 11*s.* like currency, and the fifth for lives and years, which would expire on the 1st May, 1910, at £19 0*s.* 6*d.*, like currency, the Rev. Edward Nixon and Francis Goold, trustees of the will of Sir Stephen May, in whom Edward May's estate had become vested, and James Davies, a mortgagee, in consideration of £326 2*s.*, demised to John Dinnen the several sets of premises comprised in the five recited leases, to hold for the term of 999 years, from the 1st May, 1846, subject to the said several leases of the same premises, and to the terms thereby respectively demised, and expectant upon the determination thereof respectively, rendering for and out of the same premises yearly and every year during the continuance of the term thereby demised, the yearly rent or sum thereinafter mentioned, that was to say, from and after the determination of the term demised by the firstly recited lease, and until the determination of the terms demised by the secondly and thirdly recited leases, the yearly rent of £23 17*s.* 9*d.*, Irish, equal to £22 1*s.*, present currency, and from and after the determination of the terms created by the secondly and thirdly recited leases the yearly rent of £181 17*s.* 9*d.*, Irish, equal to £167 17*s.* 11*d.*, present currency, and from and after the determination of the term created by the said fourthly and fifthly recited leases the entire yearly rent of £215 9*s.* 3*d.*, Irish, equal to £198 17*s.* 9½*d.*, present currency, the said several successive rents to be paid clear of all deductions by half-yearly payments, the first

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half-year's payment of the said firstly reserved rent of £22 1*s.* to be made on the 1st November, 1908, the first half-yearly payment of the said secondly reserved rent of £167 17*s.* 11*d.* to be made on the 1st May, 1910, and the first half-yearly payment of the said thirdly reserved entire rent of £198 17*s.* 9½*d.*, to be made on the 1st November, 1910.

By Landed Estates Court deed, dated the 19th December, 1873, the Right Hon. Stephen Woulfe Flanagan, in consideration of £125, conveyed to Robert James Tennent the premises comprised in the lease of the 5th April, 1811, for the residue of the term of 999 years, created by the lease of 1846, subject to the former lease, and subject in conjunction with the remainder of the premises, demised by the lease of 1846, to the yearly rent of £198 17*s.* 9½*d.*, but indemnified against same, save the sum of £13 8*s.* 7½*d.*, portion thereof, by other part of the said premises and liable to bear the said sum of £13 8*s.* 7½*d.*, in exoneration of all other premises charged therewith.

The estate of Robert James Tennent became vested in the defendants.

The plaintiffs claimed that their rights under the covenant for renewal contained in the lease of 1850, might be ascertained; that the estate purchased by Robert James Tennent in the premises comprised therein might be declared subject to and bound by the said covenant, in like manner as the estate of the said Robert James Tennent would have been had he obtained a renewal of the lease of 1828 for a term of 999 years, from the 1st May, 1846; that the defendants might be ordered to execute to the plaintiffs a further lease of the premises comprised in that of 1850, for 998 years from the 1st November, 1846, on payment of such fine, interest, and costs as the Court should declare to be properly payable, having regard to said covenant, or that the defendants might be ordered to admit the plaintiffs to the benefit of the reversionary interest acquired by Robert James Tennent in so much of the premises as was comprised in the lease of 1850, and to execute a conveyance to the plaintiffs, they submitting to make such contribution to all moneys paid or costs incurred by Robert James Tennent in acquiring such reversionary interest as the Court should think proper, having regard to said covenant.

It appeared that notwithstanding the lease of 1846, the owners of the five leases from Edward May continued to pay their rents to Sir Stephen May's representatives and not to John Dinnen—the lease of 1846 being treated as a reversionary lease.

*The Solicitor-General* (*W. Kenny, Q. C.*) (with him, *Stanley, Q.C.*, and *R. F. Harrison*), for the plaintiffs:—

Any accretion to his estate under the lease of 1828, and whether acquired from his own lessor, or from the trustees of May, was sufficient to impose on Robert James Tennent a duty to perform his covenant. It matters not how he became entitled to the additional interest—equity immediately imposed an obligation to make good the covenant by a renewal. If Tennent had obtained a renewal from Montgomery there would be no question as to his obligation to renew to his own lessee. Further, if he had purchased Montgomery's interest and thereby abandoned the right of accretion by renewal, the cases decide that he would have been bound to give his lessee the benefit of the acquired interest. If, moreover, instead of applying to his immediate lessor and obtaining a renewal from him, he had bought up the fee; or if the lease of 1846 had been made to him direct, the covenant would have become effective immediately; and it can make no difference that he acquired the lessee's estate under that lease by assignment. On his acquiring it his lessee's equity to the fulfilment of the covenant at once arose, and he became subject to what might be termed an equitable estoppel. The authorities on these questions are to be found in the notes to *Keech* v. *Sandford* (1). There are two classes of cases—the one arising out of an express or constructive fiduciary relation, the other out of contract. In the former class are included all cases of acquisition of additional interests by express trustees, tenants for life, joint owners, mortgagees, mortgagors, partners, &c.; the latter comprises cases of the acquisition of such interests by persons under obligation to renew. A lessee purchasing the fee is affected by an equitable estoppel in favour of his sub-lessee holding under a lease with a *toties quoties* covenant for renewal; as long as the relationship of covenantor and covenantee exists the

(1) 1 W. & T. L. C. (6th ed.), 53.

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acquired estate must feed that agreed to be given. Three early cases, *Hardman* v. *Johnson* (1), *Randall* v. *Russell* (2) and *Lesley's Case* (3), are apparently against the plaintiffs, but if they decide that a reversion purchased by a person in a fiduciary position or bound to renew will not be a graft upon the previous interest, they are not law. In the notes to *Keech* v. *Sandford* (4), *Hardman* v. *Johnson* (1), is commented on, and it is said (p. 69), that according to the decision, Johnson was trustee of the renewed lease, "and it would seem to follow that he ought not to have been allowed, while occupying that position, to purchase the reversion for his own benefit." See also the comments on that case in the judgment of this Court in *Gabbett* v. *Lawder* (5) (p. 301). As to *Lesley's Case* (3), see the note appended to the report. The decision in *Randall* v. *Russell* (2), is explained in the judgment in *Gabbett* v. *Lawder* (5) (p. 303). The more modern cases establish the plaintiffs' right: *Evans* v. *Walshe* (6); *Lawder* v. *Blachford* (7), *Postlethwaite* v. *Lewthwaite* (8), where Lord Hatherley (then Sir W. Page Wood) referring (p. 246), to the judgment of Lord Redesdale in *Evans* v. *Walshe* (6), says:—"This is tantamount to considering a purchasing lessee very much in the position of a partner or fiduciary with respect to his sub-lessee": *Giddings* v. *Giddings* (9); *Gabbett* v. *Lawder* (5); *In re Lord Ranelagh's Will* (10). The Landed Estates Court deed had not the effect of conveying the estate discharged from the obligation to renew: *Sexton* v. *M'Grath* (11).

*Meredith, Q.C.*, *Matheson, Q.C.*, and *Chambers*, for the defendants:—

The plaintiffs' arguments amount to this, that the defendants must hand over to them what Tennent bought and paid for in the Landed Estates Court. The deed of 1846 is not a conveyance of May's reversion, and the interest taken under it by Dinnen

(1) 3 Mer. 347.
(2) *Ibid.* 190.
(3) Freem. 52.
(4) 1 W. & T. L. C. (6th ed.) 53.
(5) 11 L. R. Ir. 295.
(6) 2 Sch. & Lef. 519.
(7) Beatty, 522.
(8) 2 J. & H. 237.
(9) 3 Russ. 241.
(10) 26 Ch. D. 590.
(11) Ir. R. 6 Eq. 381.

will not come into effect until 1910. He did not acquire Montgomery's interest; all he got was a reversionary interest which will have no operation until the lease of 1811 expires: the lease of 1846 is expressly subject to the latter. The rents under the five leases have been paid to May's representatives; Dinnen became in no sense landlord to Montgomery; he was a stranger, and under no obligation to him. May was not bound to renew, and his representatives by making the lease to Dinnen rendered it impossible for them to renew to Montgomery. If a lessor covenants that in case he obtains a renewal he will renew to his lessee, and he then buys from a stranger, he is not bound by any covenant, and he cannot be held to have converted himself into a trustee for his lessee. In *Postlethwaite* v. *Lewthwaite* (1) the lessee of a renewable lease applied for a renewal which was refused, but he was offered the option to purchase, which he got in his capacity of lessee. The statute provided that where a renewal was refused the lessee should have this option: the sale was carried out pursuant to the statute, and was for the benefit of all persons interested in the estate, and the purchaser was naturally held bound to share the benefit obtained. The foundation of the decision in *Gabbett* v. *Lawder* (2) was that the administrator stood in a fiduciary relation to those entitled to the personal estate. All the cases depend either on such a relationship or on the fact that a lessor bound to renew, by acquiring the reversion, renders it impossible for him to take a renewal to feed a new lease under his covenant. Here there is an intervening interest—the lease to Hill, which will expire a year before that of 1846 takes effect, while the lease of 1850 will be out six months sooner; and the plaintiffs ask to be placed in a position to be reinstated eighteen months after their original term shall have expired. There is no case in the books where the acquired interest was not the immediate reversion, and the principle of the authorities applies only where the acquisition of that interest renders a renewal to the person so acquiring it impossible. *Randall* v. *Russell* (3) was the case of the purchase of the immediate reversion, but it was not the act of the widow which rendered the renewal impossible; the chance of renewal was

(1) 2 J. & H. 237. (2) 11 L. R. Ir. 295. (3) 3 Mer. 190.

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gone when the sale took place to the stranger who was under no obligation to renew. See the judgment of the Master of the Rolls (pp. 197-8). So here, once May's trustees had leased to Dinnen in 1846, all chance of a renewal to Montgomery or by him to Tennent was gone; it was not the latter's act in purchasing in 1873 that intercepted and cut off all future renewals; Tennent gained no such advantage by his purchase. Similarly in *Hardman* v. *Johnson* (1) the Master of the Rolls on the day of hearing when saying that it would be dangerous to allow a trustee of a term to resort to the owner of a reversion to become a purchaser for his own benefit, gives the reason, and says:—"for by that means he would debar his *cestuy que trust* of the fair chance of renewal, getting into his own hands the power to grant a renewal or not at his option." This principle—that it is the fact that by purchasing he renders a renewal impossible which fixes the equity on a tenant buying the reversion for his own benefit, is also illustrated in *Trumper* v. *Trumper* (2); see the judgment there (p. 309) of Sir James Bacon, V.-C. So *Phillips* v. *Phillips* (3) was like *Gabbett* v. *Lawder* (4), a tenant for life after obtaining renewals purchased the fee and thereby intercepted the right of renewal. In *Giddings* v. *Giddings* (5) the tenant for life purchased the immediate lessor's interest, and also obtained a renewal from the superior lessor, thereby acquiring the estate out of which a further renewal should come. *Lawder* v. *Blachford* (6) turned on the terms of the covenants in the lease which were to "use his and their endeavours to obtain and procure renewals," &c., and renew. So in *Evans* v. *Walshe* (7) the question was one of construction of the covenant—the terms on which the defendant was to renew. In the present case the covenant is entirely different from that in *Lawder* v. *Blachford* (6); it is when Tennent "shall have received or obtained a renewal or new lease." None has been or can be obtained: Montgomery had no right to a renewal from May, and May's representatives cannot now grant one to him; but the defendant has not contributed to that result; and he obtained no priority or advantage by

(1) 3 Mer. 347.
(2) L. R. 14 Eq. 295.
(3) 29 Ch. D. 673.
(4) 11 L. R. Ir. 295.
(5) 3 Russ. 241.
(6) Beatty, 522.
(7) 2 Sch. & Lef. 519.

reason of his being lessee, nor did he intercept the course of renewal. The present is an *a fortiori* case to *Randall* v. *Russell* (1), which is distinguished in *Gabbett* v. *Lawder* (2). The ground on which the right is based is either that of fiduciary relation, or the acquisition of the further estate by virtue of, and as a result of, the previous position as tenant. The present case does not come within either principle. Moreover, Tennent's purchase was in the Landed Estates Court, and by his conveyance he got a perfectly new title unaffected by any obligation or equity. Kerr could not have forced Tennent to take out a renewal. There is no reported case like the present, where the plaintiffs must be out of possession for some period. Here for twelve months, notwithstanding a new lease by the defendants to the plaintiffs, Montgomery would be the only person entitled to possession. The true principle is laid down in *Nesbitt* v. *Tredennick* (3), and it does not apply here.

*Stanley, Q.C.*, in reply:—

If Tennent had purchased the fee instead of the interest under the lease of 1846 he would on the authorities have been bound to renew to Kerr out of the acquired estate. The covenant for renewal here is wide and comprehensive, being to renew when the lessor shall have obtained a renewal or new lease "for any extended term"; the persons, moreover, from whom such new lease or extended term might be acquired are not specified, which is in contrast to the covenant in the lease to Hill, which was to come into effect when Montgomery should take a new lease from the heirs of May. In 1850, when the lease to Kerr was made, Montgomery had only twelve months longer term than Tennent, and owing to the lease of 1846, he could only have obtained a renewal from Dinnen: therefore, Tennent's only expectation of a renewal was from the latter, and this is what must have been in contemplation of the parties, otherwise the covenant would have no meaning. Having covenanted to renew, he then purchased the only estate out of which the renewal could be granted. The question is one depending on contract, rather than on a fiduciary relationship

(1) 3 Mer. 190. (2) 11 L. R. Ir. 295. (3) 1 B. & B. 29.

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existing between the parties. The moment Tennent acquired an extended interest in the property, an obligation to fulfil his covenant arose. An equity thereupon attached which might be said to create a fiduciary relationship, but the question is really one of contract. If it had not been for the cases of *Randall* v. *Russell* (1) and *Hardman* v. *Johnson* (2) the question would not on the authorities be arguable. Those decisions have been explained by Pearson, J., in *In re Lord Ranelagh's Will* (3), and in the judgment of this Court in *Gabbett* v. *Lawder* (4). They were not cases depending on contract. The plaintiffs ask for the enforcement of a specific covenant, and to have a new lease granted out of the extended interest acquired by Tennent. The hiatus in the title cannot affect the question; a new lease to the plaintiffs must be subject to Montgomery's rights. The plaintiffs are entitled to a lease for 999 years from the 1st May, 1846, less six months, and subject to the lease of 1811.

Nov. 20.

THE VICE-CHANCELLOR:—

This action is brought by the plaintiffs to obtain a declaration that the estate purchased by Robert James Tennent in the lands comprised in an indenture of lease dated the 28th November, 1850, may be declared subject to and bound by a covenant for renewal contained therein, in like manner as the estate of the said Robert James Tennent would have been had he obtained a renewal of the lease of the 22nd December, 1828, for a term of 999 years, from the 1st May, 1846, and that the defendants may be ordered to execute to the plaintiffs a further lease of the said premises for 998 years, from the 1st November, 1846, on payment of such fine and interest and costs as the Court shall declare to be properly payable, having regard to the said covenant. There is an alternative claim that the defendants may be ordered to admit the plaintiffs to the benefit of the reversionary interest acquired by Robert James Tennent in the premises comprised in the said lease of 1850, and to execute a conveyance to the plaintiffs, they submitting to make such contribution to all moneys paid or costs

(1) 3 Mer. 190.
(2) *Ibid.* 347.
(3) 26 Ch. D. 590.
(4) 11 L. R. Ir. 295.

incurred by Robert James Tennent in acquiring such reversionary interest as the Court shall think proper, having regard to the said covenant for renewal.

It appears that in 1811 the May family, who were owners of a large interest under Lord Donegall in premises in Belfast—an interest large enough to enable them soon after to lease for 999 years—executed a lease of portion of those premises to John Montgomery for three lives or 99 years, from the 1st May, 1811. That lease will expire on the 1st May, 1910; it contained no covenant to renew.

On the 22nd December, 1828, John Montgomery sublet to Robert Hill part of the premises comprised in the lease of 1811, for the lives of the surviving *cestui que vies* therein named, or eighty-one years from the 1st May, 1828. That sublease will expire in 1909; it contains a covenant by the lessor to renew *toties quoties*, and a covenant by the lessee to accept such renewal.

The estate of Robert Hill became vested in Robert James Tennent, and he, on the 28th November, 1850, executed to James Kerr a lease of the premises comprised in the lease of 1828, for fifty-eight years from the 1st November, 1850—a term which will expire on the 1st November, 1908. That deed contained a covenant by Robert James Tennent. [His Lordship read the covenant for renewal.] That is not an ordinary *toties quoties* covenant, for it in terms applied to the obtaining by Tennent, not only of a renewal, but of a new lease for any extended term of the lease under which Tennent then held the premises, viz. the lease of the 22nd December, 1828, and Tennent covenanted that upon any such event he would grant and demise to Kerr a similar new lease or renewal of the premises for such extended period, reserving, in case the renewal should be for years, six months of the term as a reversion. The lessee's interest in that lease is now vested in the plaintiffs. The estate of Robert James Tennent is now vested in the defendants on the trusts of his will.

It is necessary to refer shortly to the superior title. On the 25th May, 1846, the trustees of Sir Stephen May, who represented the lessor in the original lease of 1811, made a lease to John Dinnen. That lease comprised five lots, all held for different terms, and it is peculiar, as, although it was for a term of 999

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years, from the 1st May, 1846, it is practically to take effect in possession from time to time upon the expiration of the five terms respectively. A sale of the interest in that lease took place in the Landed Estates Court in Dinnen's estate, and, by deed of the 19th December, 1873, it was conveyed by that Court, so far as it affected the premises in the lease of 1811, to Robert James Tennent, and it is now vested in the defendants as his trustees. Thus Tennent, who was under the obligation of the covenant contained in the lease of 1850 in the terms I have stated, became the owner, under the lease of 1846, of the reversion expectant on the lease to Montgomery in the premises comprised in the lease containing his covenant. He thereby deprived himself of the power to receive or obtain a renewal in ordinary course of the lease under which he held when he made the lease of the 28th November, 1850, to Kerr; but at the same moment he acquired an estate which enabled him to carry out his contract to grant a lease to Kerr for an extended period in case he should obtain such extended period, and to grant a term six months less than his own.

I think that the cases on this subject may be conveniently divided into two classes, namely, one of fiduciary relation, and the other of contract. In the former, where a fiduciary relation exists between the parties, subsisting before and independently of the transaction in question, in these cases, the elementary principle of equity applies, that no person under a fiduciary obligation can be permitted to retain any advantage that he may have acquired, directly or indirectly, in respect of such fiduciary relation. Here there was no such relation before or independently of the transaction in question; the parties were only in the relation of landlord and tenant, which does not ordinarily import anything in the nature of a trust or fiduciary relation. As to this class of cases, I shall only refer to *Gabbett* v. *Lawder* (1), where I considered the subject, and stated my views upon it. I do not think the present case comes within that first class. The other class depends on contract, and the doctrine of the Court applicable to them is that where a person has entered into an agreement such as that in the present case, and afterwards, by his own act, renders it impossible

(1) 11 L. R. Ir. 295.

literally to perform such agreement, but can do so substantially out of his newly-acquired estate or interest, he must make good his contract out of the acquired estate.

Here there was an obligation by contract which bound Robert James Tennent to grant to James Kerr an extended term in the premises demised by the lease of 1850, similar to that which he should obtain or receive himself.

In my opinion the right in such cases as the present arises more out of a sort of equitable estoppel than anything else. Where a person who has entered into a contract in respect of his estate, and afterwards does some act which prevents him from giving effect to it as intended, but acquires a new estate, which enables him thereout to perform his contract substantially, he has fixed upon him the equitable obligation to make good his contract out of the acquired interest as nearly as may be. The Court will deem him to be a trustee of such new interest for the party entitled to performance to the extent necessary for such purpose. This is not, however, a fiduciary relation, giving origin to the equitable relief, but only a mode of giving effect to it. In such cases relief is limited to giving effect to the contract, whereas, in the first class of cases, the trustee is bound to give the *cestui que trust* all benefit of every kind obtained by him in the transaction.

I hold that the defendants, as the representatives of Robert James Tennent, are bound to make an extended lease to the plaintiffs. It makes no difference that there will be a gap of a short period between the expiration of Kerr's lease and the commencement of the new lease which the defendants can give. The plaintiffs are entitled to have the covenant performed, and I do not see that the equitable obligation is affected by the fact that the new lease cannot operate immediately. Nor do I think it makes any difference that the defendants will have no profit rent out of the premises. The obligation exists whether they have a profit or not.

On these grounds I am of opinion that the plaintiffs have established their claim, and I shall declare accordingly, with costs.

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The case stood over on the minutes of the judgment until the 24th November, 1897. The following is the curial part of the judgment :—

"THIS Court doth declare that the estate purchased by Robert James Tennent, in the statement of claim in this action mentioned, in the lands comprised in the indenture dated the 28th day of November, 1850, in said statement of claim mentioned, and now vested in the defendants, is subject to and bound by the covenant for renewal in said indenture contained, in like manner as the estate of the said Robert James Tennent would have been had he obtained a renewal of the indenture dated the 22nd day of December, 1828, in said statement of claim mentioned, for a term of 999 years, from the 1st day of May, 1846 : And doth declare that the defendants are bound to execute to the plaintiffs a further lease of the premises comprised in the said indenture dated the 28th day of November, 1850, for the term of 998 years from the 1st day of November, 1846, upon payment of such fine and interest and such costs by the plaintiffs as hereinafter mentioned. And it is referred to Chambers to take and make the following account and inquiry, that is to say—An account of any sums paid by the said Robert James Tennent, his executors, administrators, or assigns, for obtaining the conveyance dated the 19th day of December, 1873, in said statement of claim mentioned, and of any costs paid by him or them for such purchase. An inquiry what proportion of such expenses and costs, with legal interest thereon, is properly payable by the plaintiffs as their contribution in respect of the premises comprised in the said deed dated the 28th day of November, 1850.

And this Court doth declare that the plaintiffs are liable to pay to the defendants such proportion, with legal interest thereon, for the new lease as hereinafter mentioned ; and upon payment thereof by the plaintiffs to the defendants, it is ordered that the defendants do execute to the plaintiffs a new lease of the premises comprised in the said deed dated the 28th day of November, 1850, for the term of 998 years, from the 1st day of November, 1846, at the rent of £30 per annum, being the rent reserved in the said deed dated the 28th day of November, 1850, such new lease to be settled at Chambers in case the parties differ. And this Court doth order that the defendants do pay to the plaintiffs their costs incurred in this action up to and including this judgment and proceedings thereby directed, when same have been taxed and ascertained."

D. M'C. M.

The defendants appealed to the Court of Appeal (Lord Ashbourne, C., and Fitz Gibbon, Walker and Holmes, L.JJ.)

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*Matheson, Q.C.*, *Gordon, Q.C.*, and *Chambers*, for the appellants.

April 19, 20.

*Ronan, Q.C.*, *Stanley, Q.C.*, and *R. F. Harrison*, for the respondents.

The arguments were substantially the same as in the Vice-Chancellor's Court.

LORD ASHBOURNE, C. :—

April 27.

This is an appeal from the Vice-Chancellor, and it in my opinion turns upon the one question of construction. There is no dispute as to facts. There is, according to my view, no necessity to decide anything, save the controversy as to the right construction of a covenant.

The narrative of deeds which raises the question is tolerably free from complication.

In 1811, Edward May executed a lease of certain premises in Belfast to John Montgomery, for three lives or ninety-nine years from the 1st May, 1811. That lease contains no covenant for renewal, and will expire on the 1st May, 1910.

On the 22nd December, 1828, John Montgomery sublet to Robert Hill part of the demised premises for the lives of the surviving *cestui que vies* therein named, or eighty-one years from the 1st May, 1828. That lease, which will expire in 1909, contains a covenant by the lessor to renew *toties quoties* and a covenant by the lessee to accept such renewal.

Robert Hill's estate became vested in Robert James Tennent, and he on the 28th November, 1850, executed a lease of the premises comprised in the lease of 22nd December, 1828, to James Kerr for fifty-eight years, from the 1st November, 1850, which will expire on the 1st November, 1908. This lease contained a very large and full covenant for renewal in wide and special terms. [The Lord Chancellor read the covenant, *ante*, p. 342.] This is no mere covenant for renewal—not an ordinary *toties quoties* covenant—for it expressly dealt with the case of Robert James Tennent obtaining a new lease for any extended term.

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The estate of Robert James Tennent is now vested in the defendants on the trusts of his will; while the interest of the lessee under the lease of 1850 is now vested in the plaintiffs.

But the defendants have now vested in them an interest which needs special note, because it has led to the present litigation.

It appears that on the 25th May, 1846, the trustees of Sir Stephen May (representing the lessor in the original lease of 1811) made a lease to John Dinnen of (amongst others) the premises in question for a term of 999 years from the 1st May, 1846. Dinnen's interest under this lease was sold in the Landed Estates Court, and by conveyance, dated 19th December, 1873, his estate so far as it affected the premises in the lease of 1811, was conveyed to Robert James Tennent, and it is now vested in his trustees, the defendants.

The position then of the defendants is this. They represent Tennent, who was bound by the obligation of the covenant I have read, contained in the lease of 1850, and they at the same time represent his interest in the same premises under the lease of 1846.

The plaintiffs, representing the lessee under the lease of 1850, claim that they are entitled under the wide terms of the covenant contained in the lease of 1850, to get a new lease for such extended term as is now possible under the lease of 1846.

The defendants entirely repudiate the claim of the plaintiffs. They point out that if yielded to there would be a break of two years, during which plaintiffs could not get possession (on termination of the lease of 1850). I cannot see that there is any force or validity in this objection.

They rely with more insistance upon the allegation that Tennent purchased in the Landed Estates Court an interest acquired by Dinnen, entirely unconnected with the lease of 1850, or with any interest under it. I by no means think that there is such a want of connection as is relied on, but I take up the words of the covenant in the lease of 1850, and in my opinion the true ground on which to decide the case is to be found in the construction of that covenant. That was an express covenant that Tennent would in substance give his lessee the benefit of any renewal, or any new lease for any extended term that might be in his power. Under

the Landed Estates Court conveyance, Tennent acquired an interest in these very premises—which was in terms a new lease for an extended term. That interest is now vested in the defendants, his trustees, and I think that they are bound under his covenant to give the relief which is sought.

It has been argued with force, that even if the terms of the covenant did not warrant such a construction, equity by its far-reaching principles, laid down in many cases, would compel the defendants to give to the plaintiffs the benefit of Tennent's new lease of the premises, and regard not only the words of the covenant, but the position and intention of the parties. Having a clear opinion upon the question of the construction of the covenant, I do not deem it necessary to discuss, much less decide these other interesting points.

In my opinion the order of the Vice-Chancellor is correct, and should be affirmed, and the appeal be dismissed with costs.

FITZ GIBBON, L.J. :—

In my opinion the state of the title, in the present case, both assists the construction which we put upon the covenant in question, and renders it more probable that this construction accords with the actual intention of the parties. We decide the case upon the construction of the covenant, and upon the ground of contract only, and we are not to be taken as expressing any opinion, one way or the other, upon the question of an equitable, as distinguished from a contractual, obligation.

The Vice-Chancellor says that "the cases on this subject may be conveniently divided into two classes, namely, one of fiduciary relation, and the other of contract." He then says—"I do not think the present case comes within the first class." Had he stopped there, and decided that the case came within his other category of contract, I should have concurred entirely in his judgment. But he does not rest his conclusion on a purely contractual obligation, but upon the doctrine of equity by which "a person who has entered into an agreement," and has "afterwards by his own act rendered it impossible literally to perform such agreement," "must make good his contract" out of any "acquired

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estate" which enables him to do so "substantially." I do not see my way to apply this doctrine to the facts of this case. Even now, it is not impossible that the defendants, as the successors of Tennent, might get from Montgomery's representatives an extension of their subsisting lease, at least for the residue of Montgomery's term, which would strictly bring them within the very words of the covenant, and bind them to give a "renewal" or a "further lease" to the plaintiffs. But furthermore, I am not prepared to decide, in the absence of Montgomery's representatives, that the defendants or the head landlord could not, even now, give a renewal or a new lease to Montgomery's representatives, consistently with the plaintiffs' rights under the covenant. The defendants are entitled to retain a reversion, and they are also entitled to a profit rent, and I decline to decide a question which involves the interests of other people, namely, that the plaintiffs are the only people to whom it is now possible to give an extended interest in the premises *puisne* to that of the defendants.

Towards the close of the Vice-Chancellor's judgment, I find a passage which must rest on a misapprehension. He says:—"The plaintiffs are entitled to have the covenant performed, and I do not see that the equitable obligation is affected by the fact that the new lease cannot operate immediately." So far we agree. But he adds—"Nor do I think it makes any difference that *the defendants will have no profit rent out of the premises.*" We understand, from the statement of counsel, that the case stood over before the Vice-Chancellor to enable the plaintiffs' counsel to consider the very question whether they could get this new lease at a lower rent than £30 a-year, because a lesser rent would be payable by the defendants under the reversionary lease, and the Vice-Chancellor's order was afterwards made up, expressly directing that the defendants should execute to the plaintiffs a new lease at the rent of £30 a year. That would leave a profit rent to the defendants of £16 11*s.* 4½*d.*, even if the reversionary lease, which reserves a rent of £13 8*s.* 7½*d.*, only, contained only the plaintiffs' premises. But, besides these, it comprises several other houses, for Montgomery's lease is much more extensive than that under which the plaintiffs hold. The decree is right, but it is not consistent with the defendants having no profit rent, and as

they are entitled to have a reversion of six months upon the plaintiffs' term, and also a profit rent, and are also the owners both of a present lease and of a reversionary lease of more extensive premises, and as, in addition to all this, they certainly might get an extension of their subsisting lease, even now, from the representatives of Montgomery, and possibly Montgomery's representatives might get some extended or further interest hereafter, we cannot decide the case upon any equity founded upon the assumption that it is now impossible literally to perform the covenant in question.

My judgment rests upon the ground that the execution of the further lease decreed is a literal performance of that covenant, so far as the defendants are, at present, able to perform it. If they should hereafter acquire any further or more immediate interest in the reversion upon their subsisting lease, the same obligation may attach to them in respect of that interest. This is not an ordinary *toties quoties* covenant to renew, because, in the ordinary case, *quoties* means whenever the mesne tenant gets a renewal from the superior landlord, and the words of this covenant expressly extend to the case of his obtaining a "new lease for any extended term," and bind him to give a "similar lease," and show that the obligation contemplated a "new" or "further" lease, though for an unknown term, and for an unknown consideration. This is not a covenant "whenever I get a renewal, I will give you one too," but it is a covenant—"If and whenever I get any further, extended, or other lease, of my reversion on your lease, which will enable me to give you a like extension of your occupation interest, you shall have it on similar terms, for whatever it costs me." What is the distinction between a "renewal" and a "new lease"? Plainly this—a renewal is a continuance of the same tenancy for a further term without interruption, and a new lease is a demise to the same tenant, but with a new root of title. If there is a new root of title, there must be a break in the tenure, and it is none the less a new lease, because there may be a temporary break in the occupation also. Unless we hold that the lease is not a new lease at all, because it is not conterminous with the old one, there being necessarily a break of title, we cannot hold that a momentary or short break of time is any more fatal than a

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break for six months, or for a year, or for two. Whenever a new lease is made, even to an old tenant, unless under the Land Acts, the landlord gets the place up, theoretically if not actually, in order to put in the new tenant. In such a case as this, where there are several successive tenants, some with small and some with larger interests, some with short and some with longer reversions, nothing is more natural or usual than that the head landlord, not being bound to renew, should allow some of the mesne interests to drop out, and, even in customarily renewable leases, such interests often drop out of themselves, through non-payment of rent, failure to pay fines, or for other causes. In such cases the essence of the covenant to give "a new lease" is not its being conterminous with an old one; its essential condition is the acquisition by the covenantor, who has demised the occupation for a rent, of an additional term which enables him to extend the period of that occupation.

This is especially true of such a case as this, where the sub-lease refers to the head lease from Lord Donegall, and shows by the terms of the covenant that the parties knew that they were dealing with an estate on which renewal, or extension, or further letting, was probable in some shape, but the precise form of it was uncertain. Can it make any difference that the covenantor bought the further interest in the Landed Estates Court? The answer must depend on the words of the covenant. Did Tennent "receive or obtain" the new lease? I cannot conceive any wider words. If there be any distinction between them, "receive" covers *inactive* and "obtain" covers *active* acquisition. In the absence of the words usual in *toties quoties* covenants specifying the superior landlord as the person from whom the upper tenant is to "obtain" or "receive" his renewal, these words cannot be construed so as to exclude acquisition by purchase.

This was a dealing with property on the Donegall estate, where it was known that lessees were not likely to be disturbed. When Tennent executed this covenant he meant this—"I am now giving you the land for building and occupation, in consideration of a fine and a profit rent to be paid to me, and if I hereafter become the owner of any further interest that will enable me to give you

the occupation for a longer period, I will retain my profit rent, and you shall continue in occupation on similar terms, if you wish, on indemnifying me in money."

The whole case of the defendants depends on the contention that this covenant does not apply, because there has been a break in the defendants' title. I have dealt with that point on the terms of the contract, on which I hold that the parties intended to bind any and every new interest which the covenantor might acquire, and it has not been disputed that the defendants are bound by Tennent's covenant.

We are all of opinion that the order of the Vice-Chancellor should be affirmed with costs.

The calculation of the amount to be paid may be difficult, because Dinnen's reversionary lease included more than Tennent purchased, and Tennent purchased the reversionary interest in more than the plaintiffs' holding, but the defendants are entitled to be indemnified so far as the plaintiffs' holding goes, and also to have the same amount of rent as at present, commencing from the date when the reversionary lease falls into possession.

WALKER, L.J.:—

I concur that the decision of the Vice-Chancellor should be affirmed, and I think that, when the facts and deeds are understood, it becomes plain that the obligation on Tennent's representatives under his covenant arose.

By the lease of the 5th April, 1811, Montgomery acquired from Rev. Edward May a lease of building-ground for three lives or ninety-nine years ending, in result, 1st May, 1910, at a rent of £14 11*s.* (Ir.); and there was a covenant by Montgomery to build a house or houses on the plot under certain prescribed regulations.

By a sub-lease of 22nd December, 1828, this Montgomery demised to Hill a portion of those premises, to hold for lives or eighty-one years, ending 1st May, 1909, at a rent of £20.

There is a covenant by Hill to build on the same terms as the covenant in his lessor's lease, and there is a covenant for renewal whenever the lessor should renew or take a new lease from the heirs of Edward May, or those entitled to grant the same, to grant

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a new lease for the full time of the renewed lease at the same rent, the lessee paying two third parts of the renewal fine, and Hill covenanted to accept the renewal.

The next step in the title is the reversionary lease of 25th May, 1846, from the trustees of May to Dinnen. This recites five leases from May, including the one of 5th April, 1811, to Montgomery, at various rents, the gross of which is £215 9*s.* 3*d.*, and for a consideration of £326 the trustees demised to Dinnen the five plots, to hold for 999 years, from 1st May, 1846, subject to the five leases, and expectant on the determination thereof, reserving rents to begin as each term expired till they together came to the gross of £215 9*s.* 3*d.*, Dinnen thus ultimately paying the same rent as the sub-lessees in possession.

Substantially the Mays parted with their reversion for 999 years, *i.e.* practically for ever, and thus Montgomery never could get, except from Dinnen or through him, a renewal of the lease of 1828.

Tennent became assignee of Hill's lease, and on the 28th November, 1850, he made a lease of the same premises to Kerr, a builder, for a term of years ending 1st November, 1908, at a rent of £30. This lease contains a covenant by the lessee to erect, build, and finish three good houses fronting May-street; and in fact Kerr took on himself the obligations of Tennent under the lease of 1828. The *toties quoties* covenant on which the rights of the parties depend is in different form from that in the lease of 1828. [The Lord Justice read the covenant, *ante*, p. 342.]

This extension could only be got through Dinnen—Dinnen to Montgomery, or Dinnen to Tennent—and Dinnen of course was under no obligation to make a lease or grant to either.

In 1873 Dinnen's lease was being sold. Now, if Montgomery had bought it, a question might arise whether Tennent could have any claim against him under the terms of his covenant; but Tennent, to save himself, bought the reversion on that lease with which his own lease was in privity for £125. The five leases were sold separately, with covenants for indemnity *inter se*.

There can be no doubt that the substance of the contract was that Kerr should get a continuation of his term from Tennent when Tennent was in a position to give it. He had taken on

himself Tennent's obligations, and Tennent became in a position to save Kerr's interest (liable to £30 rent) from determination, as he had saved his own, which was subject to £20 rent.

Thus I think the transaction within the very terms of the covenant which I have already read.

In my opinion it is, even without resorting to the equitable doctrine attaching to a lessor who, being under a covenant of this kind, gets a reversion sufficient to feed that contract passing by an intervening interest. It is not necessary to resort to it, having regard to the very general language of this covenant, and I express no opinion upon it.

HOLMES, L.J. :—

Like the other members of the Court, I decide this case on the words of the covenant for renewal in the lease of 1850 ; and I hold that the lessor having obtained within its literal construction "a new lease for an extended term" of the demised premises, thereupon became capable, and was bound to give to his lessee a similar lease for the same term, less the last six months thereof.

Although I now entertain this opinion firmly and decidedly, I confess I did not come to it easily or rapidly. My difficulty and hesitation I have no doubt arose from certain preconceived ideas which were the result of my own experience. The instances of *toties quoties* renewals with which a lawyer is familiar are cases in which the covenantor has himself, through the payment of a fine, obtained a renewal of his own lease from his immediate landlord ; and the language of the covenant commonly used by conveyancers has been framed in contemplation of that condition of things. The present case is exceptional—(1) in that the lease acquired by the lessor was carved out of a superior interest to that of his own reversioner, and (2) in that he purchased it in the open market. It will be found, I think, on critical examination, that the terms of the covenant are also exceptional; and it is probable that its peculiarities originated in the fact that the covenant was given in an unusual state of circumstances. Tennent, the lessor in the lease of 1850, the term created by which will expire on the 1st November, 1908, held under a lease made by Montgomery for a term that will expire on the 1st May, 1909. Montgomery's title

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was a lease made by May that will expire on the 1st May, 1910. Both the last-mentioned leases are specifically referred to in the lease given by Tennent to Kerr in 1850; and it is not too much to assume that it was present to the mind of the conveyancer who prepared that instrument, that while Montgomery was bound by a covenant to renew *toties quoties* to Tennent, the former had no right to obtain a renewal from May. But not only was May under no legal obligation, but there is no evidence that he had ever recognized or acted on a custom or usage to renew. A lease from a bishop or a college was generally renewed every year on payment of a substantial fine; and it was the interest of the reversioner to continue to act on this usage. In such a case it would be naturally assumed by the immediate lessee and his sub-lessee that the former would obtain renewals at regular intervals, and by means thereof could continue the sub-lessee's interest. When Tennent leased to Kerr, there was nothing in the past dealings with the property to suggest that this would be the course of events. It was not to be expected that May's representative would be asked to renew Montgomery's lease until it was on the eve of expiring; and it would then be his interest to deal with the person that would offer him the best terms. As everyone having a sub-interest would be naturally anxious to preserve it, the superior landlord would have several competitors for his favour, all of whose interests were about to terminate, or had recently determined; and the then holder of Tennent's lease would be just as likely to seek for and obtain such favour as the holder of Montgomery's. I am not of course able to say whether it was these considerations that led to the covenant for renewal in the lease of 1850, being framed as it is; but it is certain that there is not a word in it to indicate that the renewal or new lease for an extended term, the acquisition of which by Tennent was to entitle Kerr to a renewal, was to be obtained from his immediate lessor.

The only argument I have heard in support of this view is, that "extended term" means a term in immediate continuation of the term then in existence. But surely where we have the expression "a new lease for an extended term" placed in immediate juxtaposition to a renewal, the former is sufficient to cover a lease for a further term, whether such term be in continuance of, or sepa-

rated by an interval from, the lease then running. If Tennent had applied directly to May for a reversionary lease to himself expectant on the outstanding lease to Montgomery, and obtained such a lease on payment of a fine, it would, I think, be not only within the words of the covenant literally interpreted, but would be probably one of the very things within the actual contemplation of the parties. His purchase in 1873 gave him such a lease; and the words "obtain or receive," are certainly wide enough to include an acquisition by purchase; nor is it doing more violence to language to regard the purchase money as a fine or foregift than to hold, as is done every day in the administration of the Land Acts, that the fine paid by a lessee is the purchase money of the interest demised to him. Having come to this conclusion on the construction of the covenant, I am relieved from considering the other question argued on behalf of the plaintiffs. I am not prepared to say that a covenant for *toties quoties* renewal by itself, and without anything more, makes the covenantor a trustee for the covenantee; and if in this case the interest purchased by Tennent had not been a new lease for an extended term within the meaning of the covenant, I would require to consider carefully authorities, which do not always harmonize, before I could hold that Tennent was bound to give his lessee the benefit of such purchase, or to share the purchased interest with him.

Solicitor for the plaintiffs: *John Lytle.*
Solicitor for the defendants: *William Graham.*

R. D. M.

*V.-C.*
1898.
March 9.
*Appeal.*
May 3.

## O'BRIEN *v.* M'MEEL.

(1897. No. 274.)

*Incomplete gift—Voluntary trust—Subscriptions—Testimonial for past services.*

A number of persons, principally in the county for which B. was Member of Parliament, subscribed to present him with a testimonial. The amount subscribed was transferred to treasurers, who were the present defendants, to be retained by them until a meeting should be held, at which a public presentation of the testimonial was to be made to B. Before the meeting took place political differences arose between the subscribers and B., in consequence of which the defendants refused to give B. the amount subscribed:

*Held*, by the Vice-Chancellor, that the money subscribed constituted an absolute gift to B., and must be dealt with as an express trust in his favour.

*Held*, by the Court of Appeal (reversing the decision of the Vice-Chancellor), that there was no trust created in favour of the plaintiff.

The plaintiff, Mr. Patrick O'Brien, was elected in February, 1886, to represent in Parliament the North Division of the county of Monaghan, and continued to represent that constituency until the year 1892.

In November, 1890, the sum of £285 was subscribed by a number of persons in the county of Monaghan, principally Mr. O'Brien's constituents, for the purpose of presenting him with a testimonial in recognition of his services as Member of Parliament. The money was handed over to the Rev. William M'Kenna, at that time Roman Catholic Administrator of the Parish of Monaghan, and to John Treanor, Town Commissioner for the town of Monaghan, by whom it was lodged in the Provincial Bank in Monaghan. A meeting of delegates was held in Monaghan on the 19th May, 1891, when a resolution was carried that the money collected for the testimonial be handed to Canon Hoey. Treanor accordingly drew a cheque in favour of Hoey for "two hundred and eighty-five pounds sterling, collected for the Patrick O'Brien, M.P., testimonial."

This cheque was enclosed in a letter, dated the 26th May, 1891, from Treanor to Hoey, in which he stated—"On reflection I admit that the delegates were justified in demanding the money from me, and I see no way to set myself straight except by handing it over to you as chairman of the convention, to keep until the case is settled hereafter."

Canon Hoey subsequently lodged the money in the Bank in his own name, and that of the Rev. George M'Meel, the administrator for the time being of the parish of Monaghan. Canon Hoey died in July, 1895, and after his death the Rev. George M'Meel drew out the money, together with the interest which had accrued due thereon and relodged it on deposit in the branch office of the Belfast Banking Company at Monaghan, in the joint names of himself and Patrick Gormley and Patrick Rafferty (the defendants in the present action). The money so deposited remained in their names in the Bank up to the time of these proceedings.

It was originally intended by the subscribers to hold a meeting, at which a public presentation of the testimonial was to be made to Mr. O'Brien.

On the 15th September, 1890, the Rev. Mr. M'Meel wrote to the plaintiff—"At the committee of the National League here yesterday evening, it was resolved to hold a monster demonstration on the 4th of next November, at 1 o'clock, yourself being the principal speaker. . . . The real object is to present yourself with a testimonial from your constituents of North Monaghan."

The plaintiff was unable to attend the proposed meeting, as he and some of the other members of his party were prosecuted at that time for political offences.

Afterwards a difference of political opinion occurred between Mr. O'Brien and the subscribers. It appeared that Mr. O'Brien, at the time of his election had entered into a certain pledge to sit, act, and vote with the Irish Parliamentary Party. In May, 1891, the subscribers became dissatisfied with Mr. O'Brien's parliamentary action, whereupon he was requested by a letter, dated the 13th May, 1891, to define his political views for their information and that of his constituents. Mr. O'Brien did not reply to that communication. Accordingly, on the 19th May, 1891, at

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the meeting which has been referred to, *ante*, p. 366, the subscribers passed a resolution not to present the testimonial to Mr. O'Brien on the ground that he had not adhered to the pledge he had taken, but had placed himself in a position of antagonism to the Irish Parliamentary Party.

The plaintiff's claim was for a declaration that the defendants held the sum subscribed, with all accrued interest thereon, as trustees for him.

*Ronan, Q.C.* (with him *Gordon, Q.C.*, and *Clancy*), for the plaintiff:—

The various letters and documents in the case show beyond all doubt that the money which has been subscribed was intended solely for Mr. O'Brien's benefit for his past services as Member of Parliament. Hence a trust has been created in favour of a volunteer; and that being so, the persons who created it have lost all control over their contributions: *Petty* v. *Petty* (1); *Paterson* v. *Murphy* (2); *M'Keown* v. *Ardagh* (3).

*The Right Hon. The MacDermot, Q.C.* (with him *Matthew J. Bourke, Q.C.*, and *T. M. Healy*), for the defendants:—

The object of the subscribers was merely to present a gift to Mr. O'Brien. Until the meeting took place at which the public presentation was to be made to him, and which was the final act contemplated, the gift was incomplete, there being no delivery. An incomplete gift in favour of a volunteer has no operation in law: *Cochrane* v. *Moore* (4); *Maguire* v. *Dodd* (5).

Even assuming that a trust has been created, it is not an express trust, and no fraud is suggested in the case. Consequently the defendants, by the Trustee Act of 1888, sect. 8, are entitled to plead lapse of time, as if the claim was for money had and received: *In re Bowden*; *Andrew* v. *Cooper*. (6) The object of the testimonial was to enable Mr. O'Brien to remain in Parliament, and if he failed to satisfy his constituents the object of the trust fails.

(1) 22 L. J., Ch. (N. S.) 1065.
(2) 11 Hare, 88.
(3) I. R. 10 Eq. 445.
(4) 25 Q. B. D. 57.
(5) 9 Ir. Ch. R. 452.
(6) 45 Ch. D. 444.

*Gordon, Q.C.*, in reply:—

Sect. 8 of the Trustee Act of 1888 has no application to the present case. An action to recover trust property, or the proceeds thereof, retained by a trustee, is expressly excepted from its operation.

A person who receives money for a particular purpose is as much a trustee as an executor. All the evidence shows that the persons who had control over the funds looked upon them as belonging to Mr. O'Brien. The resolution depriving Mr. O'Brien of the testimonial was proposed by a person who was not a subscriber.

THE VICE-CHANCELLOR:—

The only question in this case necessary for me to offer any opinion on is, whether a trust has been in point of fact created between the parties. If once a trust is established, I think every other question raised falls out of consideration.

The plaintiff is said to be a prominent man in political matters. A large number of persons, particularly in the county which he represented, were, as they supposed, under obligations to him in respect of his past political services, for which they determined to present him with a testimonial, which is a fine name for what was really a gift or present. Subscriptions were accordingly collected by certain local persons who were in the habit of collecting subscriptions for such purposes. In all the transaction not a single condition was attached to this gift. It was an absolute gift to him by the subscribers, not dependent on what his political opinions might be in the future, but on the recollection of what his political actions were in the past. It does not make a particle of difference whether it was the gift of one person or a thousand, or whether the sums subscribed were large or small. They all contributed as they pleased. The mode of collection was by getting all the small sums together into the hands of local treasurers, who forwarded them to central treasurers. All the documents referred to in the case dealt with the subscriptions as being a testimonial for Mr. O'Brien, and they were so dealt with by the persons who received them, as well as by those who subscribed

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them. The money which was so collected remained in the hands of the treasurers, waiting for a public presentation of it to Mr. O'Brien, until a breach took place in the political relations of the parties subscribing it. First they commended the conduct of Mr. O'Brien, and then they condemned it, and said that Mr. O'Brien was false to the professions he had made, and was not entitled to get the fund. The affixing of conditions was never thought of when the fund was subscribed.

I hold this to be an absolute gift for Mr. O'Brien, and it must be dealt with as a trust. Once money is given by persons to others, to hold for the benefit of a particular person for whom it is subscribed, the doctrine of this Court constitutes them express trustees. Therefore the defendants became express trustees for Mr. O'Brien. It was contended that the doctrine of Equity, that the Court will not interfere in favour of a volunteer to complete an incomplete gift or to give effect to an imperfect trust, applies to this case. But it does not apply; because, if I am right in the view I take, it is not an incomplete gift or an imperfect trust, but an absolute trust in favour of Mr. O'Brien. On that principle I decide the case.

The plaintiff is, therefore, entitled to the amount lodged in the bank, with interest and costs.

J. MACM.

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*Appeal.* 1898.

May 3.

The defendants appealed (1).

*The Right Hon. The Mac Dermot, Q.C., M. J. Bourke, Q.C,* and *A. M. Sullivan,* for the appellants.

*Serjeant Dodd, M. Kehoe, Q.C.,* and *Clancy,* for the respondent.

Fitz Gibbon, L.J.:—

We have heard this case with care, and although there must be "a hardship" upon whichever of the parties is unsuccessful, it

(1) In the Court of Appeal before Fitz Gibbon, Walker, and Holmes, L.JJ.

would only add to their burdens to reserve judgment, as our minds are made up.

I think it necessary to trace the claim to relief, as against the defendants, back to the origin of the matter.

In order to obtain relief against the Rev. George M'Meel, Patrick Gormley, and Patrick Rafferty, the plaintiff must show some liability of those defendants *to him* either at law, or in equity as trustees of the fund. The fund found its way into the names of Gormley and Rafferty in 1895, by a transfer from M'Meel, as the surviving holder of it, on the death of Hoey. It is not suggested that the present defendants are in any different position from Hoey and M'Meel. Hoey and M'Meel got the fund by a transfer from Hoey, and Hoey got the money from Treanor in the shape of a cheque for £285. On May 28, 1891, Hoey wrote to Treanor:—"I received your cheque for £285, and shall lodge it as directed. Wish you had handed it out at once for your own peace of mind."

The direction thus acknowledged was contained in Treanor's letter of May 26, 1891, when he wrote:—"On reflection, I admit that the delegates were justified in demanding the money from me, and I see no way to set myself straight except by handing it over to you, *as chairman of the convention, to keep until the case is settled hereafter*, and since the convention has not decided the matter, I enclose you herewith a cheque for £285, being the entire amount received by me, together with the interest that has accrued on it." The postscript explains how the defendant M'Meel came in:—"I would respectfully ask you to deposit this money in the names of yourself and the administrator here, Rev. George M'Meel, as our administrator has always been *a joint treasurer in such cases.*"

The only other material circumstance is that, in the body of the cheque, the fund is described as the "Two hundred and eighty-five pounds sterling *collected for the Patrick O'Brien, M.P., Testimonial.*" Those words show the object of the parties who originated the fund, either as subscribers or collectors, but they do not purport to declare a trust, and the accompanying letter shows the intention of the transferor, viz.:—"I, Treanor, finding myself in possession of a sum of money, as to which there is a dispute, hand it to two trustees to keep until the dispute is settled." That does

*Appeal.* 1898. O'BRIEN v. M'MEEL. Fitz Gibbon, L.J.

not deprive O'Brien of any right which he previously had, but it gives him no new right against the stake-holders. If they are, by law, trustees for the plaintiff, as holding *in usum jus habentis*, he must prove his right as against those who gave the money to them to abide the result of the dispute.

Therefore, the plaintiff must show that he could recover the money from Treanor. Treanor got the money, through the joint action of himself and the Rev. Mr. M'Kenna, in different sums which were collected and from time to time, handed to the two treasurers, Treanor and M'Kenna, and which eventually got into the hands of Treanor alone. I entirely agree with the first sentence of the Vice-Chancellor's judgment:—"The only question in the case . . . is, whether a trust has been, in point of fact, created between the parties?" I hold that the Rev. Mr. M'Kenna and Treanor were trustees of the fund, in the sense that it was not their own, nor at their own disposal, but was subject to an equitable and enforceable obligation to dispose of it properly; but that does not advance us at all in the way of determining what the trust was, or who was the *cestui que trust*. On the evidence, the purpose for which each subscription was given to a parochial treasurer, and by him handed over to the general treasurers, M'Kenna and Treanor, was to form a "pool," which was to be "The Patrick O'Brien Testimonial." I have read the correspondence with all anxiety to let the money reach Patrick O'Brien, but I cannot see that the testimonial has, as yet, got beyond the stage of an intended gift, nor has even the shape of the gift been definitely fixed.

We must not convert incomplete legal or equitable things into defined trusts. Here all the parties concerned as promoters—the donors, the local treasurers, and the central treasurers—all—had the intention of presenting a testimonial to the plaintiff, and they got the money together with that intention. It was just on the point of being presented; but was the gift made? There is no evidence that the plaintiff knew anything more than what is stated in the letter of September 15, 1890, in which the Rev. Mr. M'Meel, who was one of the trustees, informed him that the object with which the money was collected was to present him with a testimonial. The Bishop's letter of October 30, 1890, is

to the same effect. The Bishop was a well-wisher and a contributor. He apologises for the miserable amount of the contributions, and he sends a list of the parishes which contributed, and of the items which make up the £285. It is impossible to hold that the intended "presentation," which never took place, was to have been anything more or anything less than the giving of the money to Mr. O'Brien, but it was not his, nor to be his, unless and until it was given to him. There was to be a meeting of the representatives of the subscribers to consider what was to be done; all the previous transactions were nothing but dealings among intending donors, and their representatives, among themselves. There never was any legal relation of owner as against agent, nor any equitable relation of *cestui que trust* as against trustee, between Mr. O'Brien and anyone else, though there was an agency, or a trustee-ship, between the subscribers and the treasurers.

In cases of this kind, the fund passes through several stages, and after the stage which this fund reached, there usually are discussions among the donors, and it is for the donors to decide, as to the shape which the testimonial is to take. It may end in a gift of money, an address, a dinner, a piece of plate, a portrait, or a statue, or a combination of such things. In this case I lay aside all that, and I assume that Mr. O'Brien would have got the cash, if he got anything. But he had not got it, and the defendants cannot be trustees for him, if the subscribers still had, or have, any voice in determining the form of the testimonial, or in withholding it.

It follows that the fund remains in the hands of the present trustees, who are liable to account for it to those who gave it to them, and though we cannot decide how the fund is to be applied, I most distinctly say that the trustees cannot dispose of it as they choose. But the defendants, though they remain answerable for the money to those who can call them to an account for it, and though they cannot give the money away from the plaintiff of their own motion, are not his debtors, nor his trustees, and we must therefore dismiss his action with costs.

*Appeal.* 1898.

O'Brien v. M'Meel.

Walker, L. J.:—

I concur in thinking that the plaintiff's claim is unsustainable. The facts of the case show that there was an intention to make a gift to Mr. O'Brien. There were parochial representatives appointed, who collected the money, and these persons paid it over to Treanor and the Rev. Mr. M'Kenna. It was lodged in the Provincial Bank by Treanor.

I think that it was intended at that time to make a present in cash to the plaintiff. The letters show that that was the first idea, but the gift was not actually made. He could have got it in November or December, 1890; but he was unable to be present to receive it just then, because, as everyone knows, Irish political views had become divergent on questions which arose. Then, in May, 1891, it was handed over by Treanor, with Mr. M'Kenna's consent, to Canon Hoey, and Canon Hoey lodged the amount in the bank on deposit receipt, in the joint names of himself and the Rev. Mr. M'Meel. On the death of Canon Hoey, in 1895, it was re-lodged by Mr. M'Meel in the Belfast Bank, in the names of himself and the other two defendants. But in all these transactions the plaintiff was not made a *cestui que trust* of the fund; but the real object was to hold it till it was seen what was to be done with it. I am, therefore, of opinion that neither at law could it be held that the money can be recovered by the plaintiff as money had and received, nor in equity can it be held that a trust was created in his favour.

Holmes, L. J.:—

I concur. There can be no doubt that the present defendants are trustees; and this puts an end to the defence of the Statute of Limitations. But the important question is, for whom they are trustees. The trusts, so far as the defendants are concerned, began when Treanor, in the month of May, 1891, sent his cheque for £285, the amount of the O'Brien Testimonial in his hands, to Canon Hoey. At that time a controversy had arisen as to the disposal of this money; and Treanor handed it over, at the suggestion of the Bishop, to Canon Hoey, to be held by him as a trustee until the controversy should be determined. The Canon

accepted this trust, and joined with himself as co-trustee Father M'Meel, who, on the death of Canon Hoey, brought in the other defendants. Under these circumstances the fund is clearly held by the defendants as trustees for the person or persons entitled to it in May, 1891. If the plaintiff could have established a right to it when it was in the hands of Treanor, he is now the *cestui que trust*, and this is the only question in the case.

It appears from the correspondence that the O'Brien Testimonial originated sometime in the year 1889, at a conference in the Monaghan Seminary, when it was determined to collect money in the different parishes that constitute the Parliamentary division of North Monaghan, for the purpose of making a pecuniary gift to the plaintiff, then the member for the division, and when Treanor and a clergyman named M'Kenna were appointed treasurers of the fund. I gather from the letters given in evidence that the most active collectors, as well as the most generous contributors, were the parish clergymen of the Roman Catholic Church, who in the first instance received the money, and afterwards transmitted it to Treanor, Father M'Kenna having previously left the county.

Now, it seems to me perfectly clear that the intention of the parties who contributed and collected was that the aggregate amount should be ultimately handed over as a gift to the plaintiff, but the notion of impressing it with a trust never entered their minds. The several amounts were sent to Treanor until a convenient time for presenting the testimonial to the intended donee would arrive; but I am of opinion that he was not a trustee at all. He was banker, agent, or treasurer for the subscribers; but he stood in no fiduciary position to the plaintiff, and while the money was in his hands the intended gift was incomplete. A voluntary transfer of property is good in law when it is carried out; but if something still remains to be done a Court of Justice cannot supply the defect, nor is it permissible to make a transaction, that was intended to operate as a legal transfer or gift, effective by treating it as a trust.

Under the circumstances, the plaintiff must fail. There will, I fear, be much practical difficulty in the way of the defendants making any disposition of the fund as a whole; and as it is their duty to see that it bears interest while it is under their control, it

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is not unlikely that the Belfast Banking Company, or some similar institution, will derive the largest benefit from the testimonial. Without anticipating other questions that may hereafter arise, I may say that a convention of representative men would have no greater authority than the defendants to dispose of it. Indeed, I do not see that even a majority of the subscribers could deal with more than the amount of their own subscriptions; and it will probably be impossible to ascertain the views of all the contributors.

Solicitor for the plaintiff: *Sheridan.*

Solicitor for the defendants: *Rushe.*

R. D. M.

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*Ross, J.* 1897. Nov. 22.

## In the MATTER of the ESTATE of CATHERINE ELIZABETH BAYLY, Owner; ELIZABETH SARA JANE FLEMING and OSWALD BAYLY MAFFETT, Petitioners.

*Record of Title (Ireland) Act, 1865—Recorded incumbrance—Unrecorded devolution of title—Petition for sale.*

Land which had been the subject of a judicial declaration of title was recorded under the Record of Title Act (Ireland), 1865, and A. was duly recorded as an incumbrancer thereon. A.'s title to the charge became subsequently vested in B. and C. by virtue of two deeds which were not recorded:—

*Held*, that until their derivative title was recorded, B. and C. could not sustain a petition as incumbrancers for sale of the land.

Motion on behalf of the petitioners, Elizabeth Sara Jane Fleming, and Oswald Bayly Maffett, to make absolute a conditional order for sale made on the 21st July, 1897.

The petition was presented on foot of a charge of £1000, late currency, formerly vested in George Finlayson, surviving trustee of a settlement, dated 22nd May, 1849, executed on the marriage of William H. Maffett and Marcella Bayly.

A declaration of the owner's title in fee simple, dated 1st August, 1876, had been obtained from the Landed Estates Court,

and was duly recorded pursuant to the Record of Title (Ireland) Act, 1865. By the land certificate the above-mentioned charge of £1000 was set forth as the first incumbrance, and stated to be vested in said George Finlayson. He died on the 20th January, 1881, and by indenture, dated 13th July, 1897, endorsed on the said settlement, the petitioners were duly appointed trustees thereof. The deed of appointment was not recorded. By indenture dated 29th October, 1897, Thomas William Bell, executor of Ellen Finlayson, who was the executrix of George Finlayson, assigned the charge to the petitioners. This deed was not recorded.

*J. Stanley, Q.C.* (with him *Ball*), for the petitioners, in support of the motion.

*John Leech* (with him, *R. E. Meredith, Q.C.*), on behalf of the owner, made a preliminary objection that the title to the lands having been recorded, the petitioners had no *locus standi* to present the petition, as the instruments showing the derivation of their title from George Finlayson, the recorded incumbrancer, had not been recorded. He cited the following sections of the Record of Title (Ireland) Act, 1865 (sects. 14, 18, 22, 25–30, 36–40). He argued that the provisions of sect. 26 that "no estate, interest, contract, or dealing, not noted on the record, shall prevail against the title of any owner . . . duly recorded under the Act," absolutely excluded the petitioners as strangers to the record.

*Stanley, Q.C.*, and *Ball*, contended that as the charge was itself recorded (sect. 14), the omission to record the devolution of title could not defeat the petitioners' right to a sale. If necessary they asked for an adjournment to enable the indenture of 13th July, 1897, and 29th November, 1897, to be recorded.

Ross, J., held that point raised on behalf of the owner was a fatal one, and dismissed the petition with costs, measured by consent at £6 6*s*.

Solicitor for the petitioners: *A. F. Maffett.*
Solicitors for the owner: *Crookshank, Davies, & Leech.*

W. G.

*Ross, J.*
1898.
April 20.

## In the MATTER of J. H. BROWNE'S ESTATE.

*Land Law (Ireland) Act*, 1896, *s.* 40—*Fee-farm grant.*

Grantees in fee-farm are entitled to the benefit of the 40th section of the Land Law (Ireland) Act, 1896.

Motion for a request under the Land Law (Ireland) Act, 1896.

*Garrett W. Walker*, for the party having carriage, in support of the motion, mentioned that one of the lots was held by the representatives of Matthew Kenny under a lease for ever made in the year 1879. He referred to sect. 26 of the Purchase of Land (Ireland) Act, 1885, and said that he understood the Court had already decided that the 40th section of the Act of 1896 applied to grantees in fee farm.

Ross, J.: Yes, the point was fully argued before me by Mr. H. D. Conner (1).

Solicitor having carriage: *R. H. Beauchamp.*

W. G.

(1) *In re Hassett's Estate*, 32 Ir. L. T. R. 115.

## IN THE MATTER OF THE ESTATE OF WILLIAM PHINEAS BURY, OWNER AND PETITIONER.

*Ross, J.*
1898.
April 25.
May 18.

*Incumbrance—Acquisition by owner in fee—Merger.*

A, who was owner of lands in fee-simple, mortgaged them in 1846. In 1850, a judgment against A was registered as a mortgage of the lands. The mortgages of 1846 became vested by assignment in B. A died, having devised her estate in fee to B, whom she also appointed executor. B paid simple contract debts and legacies of A to a greater amount than was due on foot of the judgment mortgage. B died without having given any indication of intention to keep alive the mortgages.

*Held*, that as by the payment of simple contract debts and legacies, B had conclusively admitted assets to meet the judgment mortgage and had rendered himself personally liable in respect thereof, it was indifferent to him whether the mortgages were kept alive or not, and the Court accordingly held that they were merged.

MOTION on behalf of Frances Jane Bury, as personal representative of Phineas Bury, deceased, formerly owner in fee-simple of the lands for sale, for the appointment of a receiver on foot of two mortgages of £2000 each, created by Elizabeth Bury, deceased, under whom the title of Phineas Bury was derived, each dated the 19th December, 1846, and which had become vested in Phineas Bury. The only question raised was, whether, under the circumstances which are fully stated in the judgment of Ross, J., these mortgages were subsisting charges or were merged.

*H. D. Conner*, in support of the motion, cited *Richards* v. *Richards* (1).

*Price, Q.C.*, and *William Moore*, for the owner (heir at-law of Phineas Bury) :—

We admit that the exposition of the law on this subject by Lord Hatherley in *Richards* v. *Richards* (1) is correct. But here there is no express declaration of intention on the part of Phineas

(1) Johns. 754, 766.

*Ross, J.* 1898. *In re* BURY'S ESTATE.

Bury either way. Is there any indication of his intention implied? In the absence of intention express or implied, merger will take place unless it was for his benefit that the mortgages should be kept alive: *Keogh* v. *Keogh* (1). The only benefit which could have accrued to him by the subsistence of the mortgages would be protection by them against the judgment mortgage. But by paying simple contract creditors and legatees of Elizabeth Bury, he admitted assets to satisfy the judgment against her, and precluded himself from setting up his mortgages against the judgment mortgagee. It was therefore indifferent to him thenceforward whether the charges merged or not. [It was also argued that it must be presumed that Phineas Bury satisfied the mortgages out of the assets of Elizabeth Bury: *Crampton* v. *Walker* (2).]

*Conner*, in reply:—

The property Phineas Bury derived under his mother's will was barely sufficient to cover the mortgages. Surely he would be in a more advantageous position if the mortgages were preserved as subsisting charges. He could sell them and prevent a forced sale of the estate, which might be highly detrimental to his interests. By merger he could not be benefited and might be injured: 1 Watson's Equity, 681; *Davis* v. *Barrett* (3); *Sing* v. *Leslie* (4); *Grice* v. *Shaw* (5).

Ross, J.:—

May 18.

This is an application on behalf of Frances Jane Bury for the appointment of a receiver over the hereditaments ordered to be sold in this matter.

The facts are as follows:—

In the year 1846, Mrs. Elizabeth Bury, who was the owner of this property, mortgaged it to secure a sum of £5000.

This is admitted to be the first charge on the estate, and is still a subsisting charge. On 19th December, 1846, she created another mortgage for £2000, and by an indenture of even date she created

(1) I. R. 8 Eq. 179, 449.
(2) 31 L. R. Ir. 456.
(3) 14 Beav. 542.
(4) 2 H. & M. 68.
(5) 10 Ha. 76.

a further mortgage of £2000. On 27th June, 1864, both these mortgages became vested in her son Phineas Bury, by assignment. In Michaelmas Term 1850, a judgment for £1846 3*s.* was obtained against Elizabeth Bury, to secure £923 1*s.* 6*d.* Elizabeth Bury died on 23rd November, 1869, having made a will by which she devised these hereditaments to her son Phineas Bury, subject to incumbrances, and after several legacies she devised and bequeathed all her real and personal estate charged with payment of debts to Phineas Bury.

The executors of the will were Phineas Bury and Frances Jane Bury. To them probate was granted, and it appears from the residuary account that the sum of £4297 4*s.* 7*d.* was received by them. Phineas Bury, as such executor, paid in respect of simple contract debts £2953 19*s.* 11*d.* and £800 in respect of legacies. He paid a sum of £173 in reduction of the judgment debt of £923 1*s.* 6*d.*

On 9th May, 1895, he died intestate. The present owner is his heir at-law; the applicant for the appointment of a receiver is his personal representative.

On this state of facts it is contended on behalf of the owner that inasmuch as Phineas Bury was owner of the charges and of the estate charged, a merger was effected, and that the charge no longer exists. It was further contended on behalf of the owner that inasmuch as the executor had received personal assets amounting to £4297—exceeding the amount of his mortgage debt—that this of itself effected an extinguishment of the mortgages, Locke King's Act not applying to such a case. Owing to the view I take, it is unnecessary for me to pronounce an opinion on this argument. For the applicant it is contended that no merger took place, and that the charges are still subsisting.

The law on the subject of merger is clear and well settled. When a person entitled to a charge becomes the owner of the estate charged there arises a presumption of merger. This presumption can be rebutted by proving an intention that no merger should take place. It need not be an express intention—it may be implied. Under what circumstances may it be implied?

The rule, as stated by Lord Hatherley, is this, "that where

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1898.

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it would be more beneficial to the person entitled to the land and the charge to keep the charge on foot, there the Court will raise an implication that he intended that the merger should not take effect and that the charge should be raised": *Richards* v. *Richards* (1).

In cases where the lands would be unable to satisfy all the charges, it is evidently for the interest of the owner that the charge should not merge, and the law will in that case imply no merger; nor indeed need it be proved that the incumbrances that would acquire priority by the merger would exhaust the estate so as to defeat the charges which had been merged.

To establish merger it must be shown that a period existed when it was absolutely indifferent to the owner whether the charge was kept subsisting or not. So much for the law. What remains is a question of fact. Did a period exist when it was absolutely indifferent to the owner whether the charges were kept subsisting or not?

Phineas Bury was his mother's creditor and also her executor. He was evidently acting executor because he signs the residuary account for himself and his co-executors. What does he do? Although a judgment was outstanding, he pays £2953 in respect of simple contract debts, and £800 in respect of legacies. He committed a *devastavit*, thereby admitting assets sufficient to pay the judgment debt. He could not plead *plene administravit*. He was personally liable for it. He could have been made a bankrupt in respect of it.

Before the payments he could have protected himself against the judgment by his two charges of £2000 each. But after the payments the charges could afford him no protection.

It became indifferent to him whether the charges were merged or not. I am therefore of opinion, on the law and on the facts, that the charges are merged, and accordingly refuse the motion.

Solicitors for the applicant: *Thomas Exham & Sons.*
Solicitor for the owner: *Clifford Lloyd.*

W. G.

(1) 1 Johns. 754.

*Ross, J.*
1898.
June 15, 27.

## IN THE MATTER OF THE ESTATE OF CATHERINE ELIZABETH BAYLY, OWNER AND PETITIONER; AND IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE ACT, 1891, AND OF THE SAID CATHERINE ELIZABETH BAYLY, A REGISTERED OWNER OF LAND.

*Owner in fee—Payment of incumbrances created by predecessor in title—Release—Merger.*

A was the owner in fee of lands subject to (amongst other incumbrances) five legacies under the will of A's predecessor in title. These legacies were in equal priority *inter se*. The owner, through her agent B, raised money to pay off three of the legacies. No assignment or release was executed as to one of them. The other two legatees executed deeds releasing A and the lands from their legacies. A was not an executing party to these deeds, and made an affidavit stating that she had no notice that the charges so paid off by her were not to be kept alive for her benefit, and never intended that they should be extinguished:—

*Held*, that the three legacies were subsisting charges for A's benefit.

MOTION on behalf of the owner for an order that the register of incumbrances affecting her lands should be rectified by restoring therein as incumbrances three sums of £1000 each, being legacies left by the will of John William Bayly, deceased, to his sons William Cole Bayly, Charles Arthur Bayly, and George Henry Bayly, and that the owner, Catherine Elizabeth Bayly, should be entered on the said register as owner of the said charges. The notice of motion was entitled:—"In the matter of the Estate of Catherine Elizabeth Bayly, Owner and Petitioner, and In the matter of the Local Registration of Title Act, 1891, and of the said Catherine Elizabeth Bayly, a registered owner of land."

It appeared from the affidavit of the owner, on which the motion was grounded, that a declaration of title had been made by the Landed Estates Court, dated 1st August, 1875, on her petition, and which was recorded under the Record of Title Act, 1865. In the schedule to the said declaration of title the three

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legacies in question were, amongst others, set out as charged on the lands, William Cole Bayly's legacy being stated in the schedule to be vested in William Hamilton Maffett, under an assignment dated 8th July, 1873.

Under the Local Registration of Title Act, 1891, the Record of Title was, upon the 20th December, 1897, transferred to the Local Registration of Title upon the application of Wm. Hamilton Maffett and others, and the owner was registered as full owner, subject to the incumbrances in the schedule to the declaration of title, excepting the three charges of £1000, none of which appeared upon the register. Prior to such removal they ranked in equal priority with two other legacies of £1000 and £500, respectively charged on the lands by the same will, and vested by assignment in William Hamilton Maffett. It appeared that the three legacies of £1000 each had been paid off by sums raised on the credit of the owner by the said William Hamilton Maffett, who was then her agent.

In the petition to transfer the title to the register, which was verified by the affidavit of the said William Hamilton Maffett, it was stated that William Cole Bayly's legacy was, on the 18th July, 1878, paid to William Hamilton Maffett by the owner, that no release was executed, that William Hamilton Maffett merely brought the same to the credit of the owner in his account with her as her agent, that nothing remained due on foot of this legacy. As to Charles Arthur Bayly's legacy—that by indenture of release, dated the 18th April, 1878, between Charles Arthur Bayly of the one part, and the owner of the other part, the said Charles Arthur Bayly released the lands in the certificate mentioned from all liability in respect of the said legacy—the release was not recorded—nothing was due to any person on foot of the said legacy. A similar statement was made with respect to George Henry Bayly's legacy, a release of which was executed on the 16th July, 1878.

The owner stated in her affidavit that she was not told, nor was she aware, that the three legacies were to be extinguished instead of being kept alive for her benefit, and that she had no notice of the application by William Hamilton Maffett and others to transfer the title to the register; that it was most important

for her interest that the legacies should not be extinguished, as the estate would not produce more than sufficient to discharge the incumbrances on it.

The releases recited the will of John William Bayly; that Catherine Elizabeth Bayly the owner was executrix and proved the will; that she was desirous to pay and discharge the said legacies; each release then contained a receipt for £1000, and each legatee thereby released and discharged the said Catherine Elizabeth Bayly and the lands (enumerating them). Catherine Elizabeth Bayly was not an executing party to either release.

*Matheson, Q.C.*, and *John Leech*, for the owner in support of the motion:—

All three legacies paid off by the owner are in existence for her benefit, and there was no excuse for omitting them from the register. It would be manifestly for her disadvantage that they should be extinguished, and therefore the Court will hold that there has not been any merger: *Forbes* v. *Moffatt* (1); *Grice* v. *Shaw* (2); *Richards* v. *Richards* (3). [Ross, J., said that the authorities upon merger had been recently cited to him in *In re Bury's Estate* (4).] The legacies of which releases were executed depend on the same principle.

The power to rectify the register is conferred upon the Land Judge: Local Registration of Titles (Ireland) Act, 1891, s. 34, Rule 39.

*Stanley, Q.C.*, for William Hamilton Maffett, argued that on the evidence it must be inferred that the owner Miss Bayly intended that the charges should be merged, and that at all events the lands having been actually released from the legacies to Charles Arthur Bayly and George Henry Bayly, these legacies ceased to be charges on the estate. The acceptance of the releases was a sufficient indication of an intention to merge. To revive these charges it would be necessary to set aside the releases: 1 Watson's Eq. 681.

(1) 18 Ves. 384.
(2) 10 Ha. 76.
(3) Johns. 754.
(4) *Ante*, p. 379.

*Ross, J.* 1898.

*In re* BAYLY'S ESTATE. (No. 2.)

*Leech*, in reply :—

The estate was absolutely insolvent. [Counsel referred to accounts furnished by Mr. Maffett, extending over several years, and which showed a deficiency in each year.] Miss Bayly was under no personal obligation to the legatees. To pay them off she mortgaged property of her own. The contention on the other side is that while she thus made herself personally liable to the mortgagee, she would lose the £3000 and derive no benefit whatever from having paid off these charges. It would have been manifestly against her interest to merge the charges. She did not execute the releases. Even at law the charges were kept alive until the 20th December, 1897, when the transfer to the register was made, because they appeared recorded, and the certificate was conclusive evidence of the existence of the charges specified in it: Record of Title (Ireland) Act, 1865, sect. 21; Local Registration of Title (Ireland) Act, 1891, sect. 30 (1), (3).

June 27.

Ross, J. :—

This is an application on behalf of the owner for an order that the Register of Incumbrances affecting the lands may be rectified by restoring therein as incumbrances three sums of £1000 each, legacies charged thereon by the will of John William Bayly, deceased, in favour of Wm. Cole Bayly, Arthur Charles Bayly, and Geo. Henry Bayly.

The owner, Miss Bayly, claims to be entitled to these three charges. It is contended on the other hand on behalf of Mr. W. H. Maffett, that the owner has long ago paid off these three charges—that they have been released and extinguished, and have, therefore, properly been removed from the register. The facts are as follows:—The owner entered into possession on the death of her father in the year 1873. From that time Mr. Wm. H. Maffett acted as land agent for this lady over the lands ordered to be sold in this matter. He has recently been dismissed. While agent he paid Miss Bayly various sums on account, but he never furnished her with an account, except in the year 1894, when he presented her with an account dealing with the receipts and disbursements of the year 1873.

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*In re* BAYLY'S ESTATE. (No. 2.)

Since his dismissal the owner has brought an action against Mr. Maffett in the Court of the Master of the Rolls for an account. As the suit is being prosecuted there, I must avoid dealing with any matter in controversy before his Lordship.

The owner was herself beneficially entitled to a sum of £769, charged on the lands under her father's marriage settlement, made on 2nd November, 1820, and appointed to her in the year 1870. She was also entitled to a further sum of £2231 charged on the lands by her father's will—in all £3000. In point of priority follow four legacies charged on the lands by her father's will in favour of his sons, and one in favour of his grandson, but ranking as among themselves in equal priority, namely:—1, to John Frederick Wm. Bayly, £1000; 2, to Wm. Cole Bayly, £1000; 3, to Charles Arthur Bayly, £1000; 4, to Geo. Henry Bayly, £1000; and 5, to his grandson Geo. Henry Bayly, £400.

Numbers 1 and 5 are admitted to be subsisting charges. The present controversy is whether numbers 2, 3, and 4 are subsisting or not.

As regards No. 2—the legacy to Wm. Cole Bayly—it was assigned by him to Mr. Wm. H. Maffett, and paid off by the owner in the year 1878, the owner receiving no release. As regards the legacy to Geo. Henry Bayly, this was also paid off in the year 1878. A deed of release was prepared by Messrs. Crookshank and Leech in 1875, who were then acting as her solicitors. They ceased to act as her solicitors in the following year, and the deed was not executed till 16th July, 1878, when Mr. Arthur Maffett, son of Mr. Wm. H. Maffett, was acting as her solicitor.

The legacy to Charles Arthur Bayly was paid off also on 16th July, 1878, and a release in the same form as the deed prepared by Messrs. Crookshank & Leech, was prepared by Mr. A. Maffett. The owner raised the sum of £3000, wherewith to pay off her three brothers' charges by mortgaging her own higher charges amounting to £3000. These mortgages were executed by her for this purpose on 16th July, 1878.

In a declaration of title dated 1st August, 1876, obtained by the owner pursuant to the Record of Title Act, 1865, the said three sums of £1000 appear in the schedule as incumbrances affecting the lands. This record of title has been transferred to the

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Local Registration of Title, pursuant to the provisions of the Local Registration of Title Act, 1891. The application was made by Wm. Hamilton Maffett, Mrs. Fleming, his sister, and Mr. Oswald Maffett, his son, who had charges on the estate. The owner Miss Bayly had no notice of this application.

The result of it was that the three charges do not now appear in the register.

As soon as Miss Bayly became aware of this she instituted the present application.

The law bearing on this question I have lately had occasion to consider in *Bury's Estate* (1), and for the sake of convenience I repeat the substance of what I said in my judgment in that case.

Where the same person is entitled to a charge, and to the estate charged, there arises a presumption of merger. This presumption can be rebutted by proving an intention that no merger should take place. It need not be an express intention—it may be implied. The rule, according to Lord Hatherley, is that where it would be more beneficial to the person entitled to both to keep the charge on foot, then the Court will imply that he intended that no merger should take effect, and that the charge should be raised. In cases where the land would be unable to satisfy all the charges it is evidently for the interest of the owner that the charge should not merge, and the law will in that case imply no merger; nor indeed need it be proved that the incumbrance that would acquire priority by the merger would exhaust the estate so as to defeat the charges which had been merged. To establish merger it must be shown that a period existed when it was absolutely indifferent to the owner whether the charge was kept subsisting or not.

Applying the law to the facts, we take first the case of the legacy of £1000 to Wm. Cole Bayly. The owner paid this off. No deed was executed by either of the parties. The owner expressed no intention as to whether the charge was to merge in the fee or remain subsisting. In the absence of expressed intention the question arises, was it for her interest that the charge should be kept alive, or was it a matter of indifference? It was clearly for her interest to keep it alive, because there are two charges

(1) *Ante*, p. 379.

amounting to £1500 in equal priority. It is said that at that time the estate appeared to be solvent. On the authorities that makes no material difference.

It is said that in the books of Mr. Maffett the charge was not kept alive, and Miss Bayly acquiesced in its extinguishment, but she cannot be bound by what she did not know, and as Mr. Maffett never furnished her with proper accounts as he ought to have done, there is nothing to bind her.

The Statute of Limitations has no bearing on the case.

Therefore it seems to me clear that there is no answer to Miss Bayly's application so far as this charge is concerned.

Is there any difference in principle in the case of the other charges? In each of these cases the chargeant released Miss Bayly and released the lands by deed. I will assume in each case that Miss Bayly executed the deed, which, as a matter of fact, she did not do. Each deed is executed by the chargeant only. Mr. Stanley strongly contends that the deed being in form a release for all purposes effects an extinguishment. The form of the deed seems to me to be of very little importance. It recites that the legacy of £1000 is paid off by Miss Bayly, and the chargeant releases her and the lands from all further claims. Whether the charge is to exist or to disappear does not concern the chargeant. He has got his money and has no further interest in the matter. What subsequently is to become of the charge is wholly outside the scope of the deed.

I am, therefore, of opinion that there is no difference between the case of the first charge where there was no release, and the last two charges where there were formal deeds of release.

Taking this view it is not necessary for me to express any opinion on certain subsidiary questions discussed in the argument. I shall order the register to be rectified by the restoration of these three charges.

The costs follow the result of the decision.

Solicitors for the owner: *Crookshank, Davies, & Leech.*
Solicitor for Mr. W. H. Maffett: *A. F. Maffett.*

W. G.

*Madden, J.*
1898.

May 13.
June 16.

## In the MATTER of the LOCAL REGISTRATION OF TITLE ACT, 1891, and of FRANCIS PARKINSON, a Registered Owner of Land.

*Compulsory purchase—Labourers Act*, 1896 (59 & 60 *Vict. c.* 53), *sect.* 3—*Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *second schedule—Lands Clauses Act*, 1845, *sect.* 72—*Railways* (*Ir.*) *Act*, 1851, *sect.* 17—*Sums not exceeding* £20—*Land acquired by tenant under Land Purchase Acts—Annuity payable to Irish Land Commission—Receipt.*

The Guardians of a Poor Law Union, being the sanitary authority for the district, required a small plot of ground for the erection of a labourer's cottage. The piece of ground was part of a holding purchased under the Land Purchase Acts, and subject to an annuity payable to the Irish Land Commission, who were not, however, named in the deposited schedules as persons interested, or mentioned in the arbitrator's award. The compensation awarded, being under £20, was paid by the Guardians to the registered owner of the holding who was in occupation thereof, and who gave them a receipt under section 17 of the Railways (Ireland) Act, 1851.

The Guardians contended that this payment and receipt was effectual to vest the plot in them discharged from the annuity payable to the Irish Land Commission. The Commissioners had no notice of the proceedings:—

*Held*, 1st, that the annuity was a separate interest from and paramount to the estate of the owner, and the subject of distinct compensation.

2ndly, that as the Commission were not named in either the deposited schedule or in the award, they were not affected by the publication of the notice of the appointment of the arbitrator: *In re Doyne's Traverse* (24 L. R. Ir. 287).

3rdly, that the payment of the purchase-money to the owner of the holding, and his receipt for it, did not operate to vest the plot of ground in the Guardians discharged of the annuity to the Land Commission.

Appeal by the Irish Land Commission from an order of the Registrar of Titles, dated the 3rd March, 1898, directing that the Guardians of the Poor of the Listowel Union (county Kerry) be registered as owners of a plot of land acquired by them under the Labourers Acts, 1883–1896, freed and discharged from the annuity of £11, payable to the Commission under the provisions of the Land Purchase (Ireland) Acts, 1870–1891.

By a vesting order of the Irish Land Commission, dated 27th July, 1893, part of the lands of Tullig, containing 38 acres, 35 perches statute, situate in the barony of Clanmaurice, and county of Kerry, were vested in Francis Parkinson, subject to and charged with the repayment to the Land Commission of £275, advanced by them for the purchase of the lands, with interest thereon, by an annuity of £11 a-year, payable for forty-nine years. The premises comprised in the vesting order were duly registered pursuant to the Local Registration of Title (Ireland) Act, 1891, on the 31st July, 1893, subject to any rights or equities arising from the interest being a graft on the previous interest of the purchaser or otherwise arising from the existence of such previous interest.

The Listowel Poor Law Guardians, being the Rural Sanitary Authority under the Labourers Acts, required 2 roods 9 perches of the lands as a site for a labourer's cottage. With reference, *inter alia*, to this parcel of ground, the Guardians applied to the Commissioners of Public Works to appoint an arbitrator. Mr. Joseph Abbott was appointed arbitrator, and by his final award dated 23rd April, 1897, he awarded the said Francis Parkinson £15 12*s*. 8*d*., as compensation for the purchase of the parcel of ground required. No other sum was awarded to any other person in respect of the same. The Guardians accordingly paid Francis Parkinson the said sum of £15 12*s*. 8*d*., and obtained his receipt therefor. This receipt was in the following form :—

THE LABOURERS (IRELAND) ACTS, 1883 TO 1896.

LANDS OF TULLIG.

I, Francis Parkinson, of , in the county of Kerry, being the owner and occupier of the lands hereinafter mentioned, do hereby acknowledge to have received from the Guardians of the Poor of the Listowel Union (county Kerry), acting as the Rural Sanitary Authority, the sum of £15 12*s*. 8*d*. sterling, as and for the compensation payable to me for and in respect of all my estate, term, and interest as owner or otherwise of and in all that and those part of the lands of Tullig required for the purpose of a site for a labourer's cottage, with plot of ground attached, situate in the townland of Tullig, barony of Clanmaurice, and county of Kerry, and containing 2 roods 9 perches, statute measure, or thereabouts, and also for all compensation payable to me by reason of the taking of the said land with the appurtenances by the said Guardians, and also for all damage done or to be done to me in my

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ownership (or tenancy) of said land, and the lands adjoining the said lands so taken or to be taken by the said Guardians, and also for all loss and inconvenience arising to me by reason of the building of such cottage and the taking of said lands, and in consideration of which said sum I have delivered, and do hereby deliver, and hand over to the said Guardians the possession of said lands, and I hereby relinquish all claims and demands upon the said Guardians and the Guardians for the time being of the said Union, their successors and assigns, and their property and effects, in respect of same, and in respect of the several matters and things hereinbefore mentioned.

In witness whereof I have hereunder set my hand and affixed my seal this 10th day of May, 1897.

[Duly executed by the said Francis Parkinson.]

On the 1st September, 1897, the Guardians applied to be registered as owners in fee-simple of the said 2 roods and 9 perches, and on the 20th October, 1897, notice of the application was given by the Registrar of Titles to the Irish Land Commission. The Commission served upon the Registrar notice of their objection to the registration of the Guardians as owners in fee-simple, discharged from the annuity of £11 a year. In their objection they stated (as was admitted in the proceedings to be the fact) that until the Registrar's notice they had no knowledge of the steps taken by the Guardians for the acquisition of the lands. On the 15th November, 1897, a conditional order was made by the Registrar overruling the objection, and directing the registration of the Guardians as owners in fee, freed and discharged from the annuity of £11 payable to the Land Commission. The Land Commission showed cause by affidavit verifying the facts and documents already stated, but the Registrar, after hearing counsel on both sides, made absolute the conditional order.

*Ronan, Q.C.*, and *D. M'Carthy Mahony*, for the Irish Land Commission:—

The receipt has no greater effect than a conveyance by Francis Parkinson of his interest would have had. True it would be binding on all persons claiming under him, but the Land Commission do not claim under Parkinson—their annuity is paramount to his estate. [Counsel referred to sect. 72 of the Lands Clauses Act, 1845, and sect. 17 of the Railways (Ireland) Act, 1851.] As

to the scope of the Lands Clauses Act, the words "all estates and interests" contemplate several estates. In sect. 7 each estate and interest is kept distinct. Again, in sect. 69, the limited interests mentioned are the same as in the earlier section 7. The key to the section is to be found in the words "any lands, or any interest therein." As in the earlier sections a limited owner of a partial interest can dispose of that interest only, so here where the purchase-money exceeds £200, and the party is under disability, each limited and partial interest must be separately acquired. Sect. 70 directs the procedure by which the purchase-money in such cases of disability is to be applied. Sect. 71 deals with compensation exceeding £20, but under £200. Then comes sect. 72, on which the question here turns. This section does not mean that the compensation is to be paid to the parties entitled to the rents and profits, as trustees, for themselves and all others entitled. It is to be paid to them for their own use and benefit. But in the case of a limited owner the compensation to be paid to him must be compensation in respect of the estate in which he has a partial interest. As for example, take the tenant for life of a leasehold. He could have no right to the purchase-money of the reversion and *e converso*. So here the title to the rentcharge and the title to the lands must be kept distinct. There are a special set of clauses, commencing with sect. 108, which deal with land subject to mortgages. So sections 115–118 specially deal with rentcharges. Sect. 124 would appear to apply to a case like the present, where the promoters omitted to acquire a particular interest. At all events, the Registrar was erroneous in holding that the annuity was extinguished: *Martin* v. *London, Chatham, and Dover Railway Co.* (1).

*Matthew J. Bourke, Q.C.*, for the Guardians:—

The policy of the Lands Clauses Act, 1845, was to enable the promoters of the undertaking to acquire the requisite land free from every interest: sect. 18. Sect. 19 prescribed the service of notices on the parties interested. This procedure still prevails in England. But in Ireland a different procedure was introduced by the Railways (Ireland) Act, 1851. If we were in England,

(1) L. R. 1 Ch. App. 501.

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or if the Act of 1851 had not been passed, and had served the Land Commission with notice to treat, they would unquestionably have been bound. Has not what is equivalent to such notice been done under the law at present in force in Ireland? (Railways (Ireland) Act, 1851, sects. 4-8.)

In *In re Traverses of Trustees of Doyne, and the South City Markets Co.* (1) it was held that the publication under sect. 8 of the arbitrator's appointment was equivalent to notice to treat under the Lands Clauses Act. We have complied with all the statutory provisions of the Act of 1851, and are therefore in the same position as if in England we had served the Land Commission with notice to treat.

The Legislature had in view that the promoters were obliged to pay all costs of getting money lodged in Court paid out to the parties entitled, and when the value of the land taken was under £20 they provided for payment of it to the person in possession, even though a limited owner, as the cost of obtaining payment of such sums out of Court would be altogether out of proportion to the amount of the purchase-money. But the Guardians are in exactly the same position as if they had lodged money under sections 69 and 71 of the Lands Clauses Act. Even if they have not got a receipt in proper form, they are entitled to get one. The real question is—What was their legal position when they paid the money? Sect. 124 only applies where the promoters have omitted to serve notice on some party interested, not where a party, though served, omits to intervene. [Counsel cited sects. 9, 17, and 18 of the Railways (Ireland) Act, 1851.] Supposing money lodged under sections 69 or 71 of the Lands Clauses Act, 1845, what is the position of the promoters against all the world? In Equity they at once acquire a perfect title against everyone, though for practical purposes this may have to be clothed with a legal title. If the owners refuse to convey the legal estate, or if title cannot be made, the promoters can, under sect. 75, execute a deed poll by which they can obtain a perfect title. "All the estate and interest in such lands of or capable of being conveyed by the party between whom and the promoters

(1) 24 L. R. Ir. 287.

. . . such purchase-money shall have been . . . deposited as aforesaid, shall vest absolutely in the promoters . . . and they shall be entitled to immediate possession of such lands." Surely the same result must follow if a sum under £20 is paid pursuant to the provisions of sect. 72, to a party in possession, and a receipt be demanded. [MADDEN, J.: It appears to me that you are not in a position to execute a deed poll under sect. 75, and, if the Land Commission do not claim under Parkinson, where is your statutory title?] We have taken all the steps which the statutes prescribe. See Browne and Theobald notes to sects. 71, 72.

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*D. M'Carthy Mahony*, in reply:—

Although of course the object of the Acts was to vest the fee in the promoters it was also none the less an object of these Acts to effectively protect the rights of parties interested in lands compulsorily taken. This was an application by the Guardians to be registered as full owners. How do they show that the purchase annuity is released or vested in them? The repealed sections of the Land Clauses Act, 1845, contemplated the separate acquisition of every separate interest. In the sections prior to 108 it is not suggested that mortgagors could convey free from mortgages. By section 108 and the following provisions, the promoters are empowered to redeem mortgages. Acquisition of interests is made up of two parts. First, payment to proper parties; secondly, statutory conveyance. Payment must be made in respect of a particular interest. Promoters are bound to get compensation assessed in respect of every known interest. If unknown it may possibly be treated as an omitted interest under section 124. Here the purchase annuity has not been acquired by the Guardians. Compensation in respect of it has not been assessed and has not been paid.

MADDEN, J.:—

June 16.

Although this case comes before me pursuant to the provisions of the Local Registration of Title Act, the question which it involves does not arise upon the construction of that statute. The Guardians of the Poor of the Listowel Union, having acquired a

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parcel of registered land under the provisions of the Labourers (Ireland) Acts, applied to be registered as owners in fee-simple. Inasmuch as the parcel of land so acquired formed part of a holding purchased by one Francis Parkinson under the Land Purchase Acts, notice of the application was directed to be served on the Land Commission. An objection has been filed on the part of the Commission setting forth the vesting order dated the 27th July, 1893, by which a certain holding, of which the plot in question forms part, was vested by the Commissioners, acting under their statutory powers, in Francis Parkinson, subject to the repayment of the purchase-money of £275 by an annuity of £11, payable for the term of forty-nine years. The objectors state that they received no notice of the proceedings under the Labourers Acts, and suggest that no steps were taken by the Guardians to acquire their interest in the annuity, or to have it redeemed, apportioned, or released. The Guardians, on the other hand, contend that they have acquired a statutory title to the absolute fee-simple of the plot in question, by reason of their compliance with the provisions of the Labourers Acts relating to the compulsory acquisition of land.

Those provisions are somewhat complicated, not the less so because the course of procedure must be collected from four distinct Acts of Parliament. The principal Act is the Lands Clauses Consolidation Act of 1845, the 16th and following clauses of which are the foundation of all procedure for the compulsory acquisition of land, here and in England. Then came the Railways (Ireland) Act, 1851, which substituted deposited plans and schedules, with public advertisements, for the notices to treat required by the Act of 1845. The second schedule of the Housing of the Working Classes Act, 1890, provides for the compulsory acquisition of land for the purposes of that statute, by way of amendment of the Lands Clauses Act; and, finally, the Labourers (Ireland) Act, 1896, enacts that for the purpose of taking lands compulsorily for labourers' cottages the provisions of the Lands Clauses Acts are to be deemed to be amended by the provisions contained in the second schedule of the Housing of the Working Classes Act, 1890. No mention is made in the Labourers Act of the governing statute in Ireland, the Railways Act of 1851; but it is incor-

porated in the provisional order under which the Guardians have proceeded; and in any case it would probably be held to be included in the words "Lands Clauses Acts" used in relation to Ireland.

Now, the general principle of these enactments may be shortly stated. They contemplate the acquisition by promoters in the position of the Guardians, of the fee-simple of the land required for purposes of public utility, freed and discharged from all other estates and incumbrances. When this cannot be effected by agreement, a course of procedure is prescribed by which compensation may be awarded to all persons interested in the land, and a statutory title to the absolute fee-simple may be acquired by the promoters.

Under the Lands Clauses Act, which supplies (as I have said) the foundation of the entire system, the promoters must serve a notice to treat on all persons interested in the land (sect. 18). For these notices to treat, the Railways (Ireland) Act substitutes the deposit of maps and schedules, "together with the names of the owners or reputed owners, lessees or reputed lessees, and occupiers of the said lands respectively, so far as the same can be reasonably ascertained, with estimates of the gross annual value and the value in fee of such lands so required to be purchased or taken as aforesaid, and for the purchase of which, or of all the several interests in which, the Company shall not have contracted, and the separate and distinct value of each such interest which the Company shall not have contracted to purchase, so far as the same can be reasonably ascertained" (sect. 4). Public notice must be given of the proposed arbitration (sect. 8), at which the arbitrator is to "inquire into and adjudicate upon the value of the lands required for the purposes of the railway [in the case of a railway], and specified in such maps or plans, and the several interests in such lands in respect of which no agreement shall have been come to between the Company and the persons entitled thereto" (sect. 9).

The Guardians having, on the 22nd of November, 1893, obtained a provisional order authorising the compulsory acquisition of land for the purposes of the Labourers (Ireland) Act, took certain proceedings for the purpose of acquiring (amongst others) the plot of land in question. The deposited schedule purports to

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contain the names of the reputed owners, lessees and occupiers. The occupier is stated to be Francis Parkinson. The representatives of J. B. Browne are mentioned as reputed owners, and the "estimated value in fee," £11 14*s.*, is allocated as follows:— £7 16*s.* to the representatives of Browne, and £3 18*s.* to Parkinson. No mention whatever is made of any estate or interest vested in the Land Commission, and so far as the deposited plan and schedule are concerned, there is nothing to suggest that the Guardians contemplated the acquisition of any such interest. An arbitrator was appointed, who by his final award dated the 23rd of April, 1897, awarded the sum of £15 12*s.* 8*d.* to Francis Parkinson. No sum was awarded to any other person, and the Guardians paid this sum to Parkinson, who signed a receipt, which was duly stamped, in accordance with the 19th clause of the second schedule to the Housing of the Working Classes Act, under which they claim to have acquired the absolute fee-simple of the land, freed and discharged from the annuity.

Now if the compulsory purchase of this parcel of land had been carried out under the provisions of the Lands Clauses Act, it is clear beyond doubt that the Land Commission should have been served with notice to treat, as one of the "parties interested in such lands" within the meaning of the 18th section. They are the owners of an incorporeal hereditament, or rentcharge, issuing out of, and charged upon the lands. They hold this rentcharge as security for the payment of a mortgage debt. As mortgagees they should be served with notice to treat by promoters who desire to acquire their interest as such (*Martin* v. *London, Chatham & Dover Railway* (1)). It is, however, as rentchargeants that their position has been mainly discussed, and their title to the purchase annuity is the question before me for decision. The Lands Clauses Act contains specific provisions with respect to land subject to a rentcharge (sects. 115–118), from which it is plain that an interest of this kind is to be acquired by promoters, on payment of compensation, like any other estate in land. Should the promoters omit by mistake to purchase "any estate, right, or interest in, or charge affecting" the lands taken by them (words which would include an interest such as that vested in the Land Com-

(1) L. R. 1 Ch. 501.

mission), they are empowered to purchase the interest so omitted under sections 124–126. A cheaper and more expeditious procedure is substituted for those proceedings by the Housing of the Working Classes Act, in cases to which that statute applies. As I read the Act, each separate estate or interest in the lands sought to be acquired must be the subject of a notice to treat. When this has been done, and the price fixed by arbitration, the promoters occupy the position of vendor and purchaser by contract: *Harding* v. *Metropolitan Railway Co.* (1). But no such relation exists between the promoters and the owner of an interest who has not been served with notice to treat.

The Railways (Ireland) Act substituted for the service of notices to treat the simpler procedure of depositing plans and schedules, containing a distinct valuation of each interest which the promoters seek to acquire otherwise than by contract. When this has been done, it has been held that the publication of the notice of the appointment of an arbitrator under sect. 8 of the Act is, as regards any person affected by it, equivalent to the service of a notice to treat under the Lands Clauses Act: *In re Doyne's Traverse* (2). Upon the authority of that case the learned Registrar was of opinion that the Commission were bound by the arbitration and the subsequent proceedings as fully as if they had been served with notice to treat in a proceeding under the Land Clauses Act. But his attention does not appear to have been directed to the circumstance which appears to me to distinguish *In re Doyne's Traverse* (2) from the present case. That case was decided as between the promoters and a traverser who was in privity with the proceeding throughout. In the present case the Land Commission are strangers to the entire proceeding. Their interest is not mentioned in either the deposited schedule or the award, and (adopting the language of the learned Judge by whom *In re Doyne's Traverse* (2) was decided) I do not think that they are affected by the publication of the notice of the appointment of the arbitrator. If the publication of that notice affected the Commission with notice of anything, it was of the absence of intention on the part of the promoters to acquire their interest in the land, and it operated as the opposite of a notice to treat. I

(1) L. R. 7 Ch. 154. (2) 24 L. R. Ir. 287.

*Madden, J.* 1898. *In re* PARKINSON.

cannot, therefore, hold that the Commission are bound by the arbitration, as they would have been if served with notice to treat in a proceeding under the Lands Clauses Act.

It is further contended that, even if the Commission were not bound by the proceedings before the arbitrator, the Guardians had acquired a statutory title under the 72nd section of the Lands Clauses Act, read in connection with the 19th clause of the schedule to the Housing of the Working Classes Act. The 72nd section of the former Act provides that sums not exceeding £20 "shall be paid to the parties entitled to the rents and profits of the lands in respect whereof the same shall be payable, for their own use and benefit." This section is one of a series enacted "with respect to the purchase-money or compensation coming to parties having limited interests." If I am right in holding that each separate estate must be the subject of distinct compensation, it has no application to the present case. If Parkinson's estate had been in settlement, he could have received the entire compensation as tenant for life, but he is not a limited owner *quoad* the incorporeal hereditament vested in the Commission. The receipt clause contained in the schedule to the Housing of the Working Classes Act seems to be equally inapplicable. The receipt operates as a statutory conveyance of all the estate and interest of Parkinson, and of all parties claiming through or under him. It was argued that a receipt given by A. under this provision would convey an estate or interest with which A. had parted under a previously executed deed even if for value, inasmuch as the grantee would be a person claiming under A. This would be a strange result, but I do not think it necessary to consider the point, for it is plain to my mind that the Land Commission do not claim under Parkinson. He never had the fee out of which the rentcharge is carved. His estate in fee and the purchase annuity were both created by the exercise of statutory powers vested in the Commission, operating upon the fee-simple of the lands.

For these reasons I am of opinion that the rentcharge in question has not been acquired by the promoters, and I must allow the objection of the Commission.

Solicitor for the Irish Land Commission: *W. Alexander.*

Solicitor for the Listowel Guardians: *F. Creagh.* W. G.

IN THE MATTER OF THE ESTATE OF GEORGE BOLTON, OWNER; WAKEFIELD CHRISTY, PETITIONER.

*Ross, J.*
1898.
July 13.

*Land Law (Ireland) Act*, 1896, *s.* 40—*Superior interests—Amount realizable from sale to tenants inadequate to redeem.*

Where the value of superior interests exceeds the amount capable of being realized by a sale to tenants, the 40th section of the Land Law (Ireland) Act, 1896, is inapplicable.

ADJOURNED CONSIDERATION of the report of the Irish Land Commission made under the 40th section of the Land Law (Ireland) Act, 1896. The report having come before the Land Judge on the 2nd February, 1898, an offer was made by Mr. George Kinahan (not a tenant), to purchase lot 11 for £1500, and it was referred to the Examiner to report *inter alia*:—

1. What sum of purchase-money should be given for lot 11, in order that after satisfaction and redemption thereout of the several superior interests and instalments in lieu of tithe rent-charge affecting such lot, there should remain a sum of £1500 cash surplus?

2. What part of said sum so to be ascertained should be paid in respect of the portion of the said lot, which is in the hands of tenants mentioned in the schedule to the report of the Land Commission in this matter?

The Examiner accordingly made his report dated 1st July, 1898, and found—1, that to have a cash surplus of £1500, after redemption of all superior interest affecting lot 11, £13,427 1*s.* 6*d.* would be required; 2, the sum of £6844 was the estimated value of the portion of lot 11, in the hands of tenants mentioned in the report.

It appeared that Mr. Kinahan was owner of other lands subject to the superior interests.

*C. W. R. Brady*, for the petitioners, having carriage.

*M. Kehoe, Q.C.*, for Mr. Kennedy (a tenant), opposed the acceptance of Mr. Kinahan's offer.

*Ross, J.*
1898.

*In re*
BOLTON'S
ESTATE.

*J. H. Shaw*, for incumbrancers, supported the offer.

*G. W. Walker* appeared for Kinahan.

Ross, J.:—

At an early period in the administration of this Act I held that I had no jurisdiction to sell to any outside purchaser without first making offers to the tenants. That opinion, after a good deal of discussion, was maintained in the Court of Appeal.

The question arises whether the sale of lot 11 comes under the 40th section? It is plain that there is a condition precedent to the exercise of my powers under that section. I must have a fee-simple to sell. It is plain that where the value of the superior interests is so great that this redemption would more than swallow up all that could be obtained by a sale to the tenants I have no fee-simple to offer. I am satisfied that the amount that could be raised from a sale of these agricultural lands would not be sufficient to redeem the superior charges. The 40th section therefore does not apply. That being so, I have before me an adequate offer from Mr. Kinahan, who is owner of other valuable premises which are also subject to these superior interests. It is therefore open to me to accept this offer, and I do so accordingly.

Solicitors having carriage: *Mecredy & Son.*
Solicitors for Mr. Kennedy: *M'Cann & Brown.*
Solicitors for incumbrancers supporting Mr. Kinahan's offer: *Whitney & Moore.*
Solicitor for Mr. Kinahan: *R. H. Beauchamp.*

W. G.

## HUTCHINSON *v.* TOTTENHAM.

(1898. No. 713.)

*V.-C.* 1898. June 29, 30. July 22.

*Power—Execution—Excessive appointment—Appointment to object for life, with power to appoint by will—Perpetuity—Delegation—Appointment to children of S. born in testator's lifetime—Gift over if S. should die without leaving any child—Referential construction—Hotchpot clause—Two funds.*

By marriage settlement certain judgment moneys of the husband were settled upon trust, after the death of the husband and wife, for the children, grandchildren, or other issue of the marriage, born in the lifetime of the husband and wife, or one of them, in such shares as they or the survivor should appoint, and in default of appointment, for the children, being sons, attaining twenty-one, or being daughters, attaining twenty-one, or marrying: and certain government stock (the wife's fortune) was settled upon trust, after the death of the husband and wife, thereout to pay £1000 to each of the children when being sons they attained twenty-one, or being daughters they attained twenty-one or married, and as to the residue of the said stock for the children, grandchildren, or other issue of the marriage, to be born in the lifetime of the husband and wife or one of them, in such shares as they or the survivor should appoint, and in default of appointment, for the children being sons attaining twenty-one, or being daughters attaining twenty-one, or marrying. The settlement contained a proviso that in case any appointment should be made in pursuance of the powers therein contained or either of them, which should only extend to a part or parts of the said judgment moneys and stock, such appointment should be valid, notwithstanding the non-appointment of the remaining part or parts thereof, but in that case any child entitled to a share under such appointment should be entitled to no further share of the unappointed part or parts of the said respective trust moneys, stocks, &c., unless and until he or she should have brought his or her appointed share into hotchpot.

There were children of the marriage two sons and a daughter. The husband died without having joined in any appointment, leaving his wife surviving. Two granddaughters were born in her lifetime. She by her will appointed the judgment moneys to one son, and after reciting the settlement of the stock, and that £1000 was to be paid thereout to each child, she appointed £10,000 thereof to her daughter, and as to the residue of the said stock, she appointed it to trustees upon trust to pay the income to the other son for life, and after his decease upon trust for such one or more of his children born in

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her own lifetime, and in such shares as he should by will appoint, and in default for such persons as he should by will appoint, with a gift over in case the son should die without leaving any children, or remoter issue him surviving.

The testatrix made a codicil by which she revoked the appointment of the £10,000 stock, and appointed same to trustees upon trust for her daughter for life, and after her death for her child or children, born in the testatrix's lifetime, in such shares as the daughter should by deed or will appoint, and in default of such appointment for such children share and share alike: provided that if her said daughter should die without leaving any child or children, the trustees should hold the said trust funds upon trust for the testatrix's said granddaughters.

*Held* (1), that the limitations in the will of the residue of the stock, subsequent to the appointment of the life interest to the son, were void for remoteness; and that the power of appointment to the son was a delegation of the power given by the settlement, and void, and that, so far, those limitations were void on this ground also. (2) That the limitations in the codicil after the daughter's death constituted a direct valid appointment to the daughter's children, born in the testatrix's lifetime, leaving it to the daughter only to appoint the shares in which they should take; that the latter power was separable from the appointment to the daughter's children, and void as a delegation, leaving the appointment to the children unaffected; and, applying *Ellicombe* v. *Gompertz* (3 My. & Cr. 127), that the gift over was to be construed as applying only to the failure of children of the daughter, born in the testatrix's lifetime, and that the appointment to the granddaughters was valid. (3) That the single hotchpot clause applied to all the funds without distinction, and that the son to whom the judgment moneys were appointed was bound to bring his interest into hotchpot.

ADJOURNED SUMMONS.

By an indenture of settlement dated the 23rd August, 1834, and made on the marriage of the Hon. Coote Hely Hutchinson and Sophia Synge Hutchinson, reciting that the said Coote H. Hutchinson was absolutely entitled to the principal sums of £1031 13*s.* 4*d.*, £1384 12*s.* 3*d.*, £1737 12*s.* 3*d.*, and £276 18*s.* 6*d.*, amounting together to £4430 16*s.* 4*d.*, and the several judgments and securities for the same, mentioned in an assignment of equal date to the trustees of the settlement, and that the father of the said Sophia S. Hutchinson had transferred to the said trustees £20,000, 3½ per cent. government stock, as the marriage portion of the said Sophia S. Hutchinson, it was declared that the trustees should hold the said principal sums upon trust to pay the interest

thereof to Coote H. Hutchinson during his life, and after his decease, in case he should die in the lifetime of Sophia S. Hutchinson, to pay the same to her during her life, and after the decease of the survivor then as to the said sums in trust for all or any one or more of the children or grandchildren or other issue of the said Coote H. Hutchinson and Sophia S. Hutchinson, such grandchildren or other issue to be born in the lifetime of the said Coote H. Hutchinson and Sophia S. Hutchinson, or one of them, for such interest or interests, either present or future, and in such parts, shares, or proportions, and subject to such conditions, restrictions, and limitations over in favour of any other or others of the said children, grandchildren, or other issue, and with such directions, &c. as the said Coote H. Hutchinson and Sophia S. Hutchinson should by deed appoint, or as the survivor should by deed or will or codicil appoint, and in default of such appointment and subject, &c. in trust for their children, in the case of sons attaining twenty-one, and in the case of daughters attaining that age or marrying, in equal shares, with an ultimate limitation to Coote H. Hutchinson: and it was declared that the trustees should hold the said £20,000 government stock upon trust, out of the interest and dividends thereof to pay to Sophia S. Hutchinson the annual sum of £200 for her separate use; and as to the residue of the said interest and dividends during her life, and as to the entire interest and dividends after her decease in case she should die in the lifetime of Coote H. Hutchinson, upon trust to permit him to receive the same during his life, and after his decease in case Sophia S. Hutchinson should survive him, upon trust to permit her to receive all the interest and dividends of the said government stock during her life, and after the decease of the survivor, as to the said £20,000 government stock, in trust thereout to pay £1000 to the child if only one, and the like sum to each of the children if more than one, of the said Coote H. Hutchinson and Sophia S. Hutchinson, when being sons they should attain the age of twenty-one years, or being daughters they should attain that age or be married, and as to the residue of the said £20,000 government stock which would remain after the payment of such sum of £1000 to each of such children respectively as aforesaid, in trust for all or any one or more of the children or the grandchildren or other issue of the said

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Coote H. Hutchinson and Sophia S. Hutchinson, such other issue to be born in the lifetime of the said Coote H. Hutchinson and Sophia S. Hutchinson, or one of them, for such interest or interests, either present or future, and in such parts, shares, or proportions, and subject to such conditions, restrictions, and limitations over in favour of any other or others of the said children, grandchildren, or other issue, and with such directions or regulations for maintenance, education, and advancement, and to be transferred or assigned at such age or ages, either absolutely or upon such contingencies as the said Coote H. Hutchinson and Sophia S. Hutchinson should by deed, or as the survivor of them should by deed or will or codicil appoint; and in default of such appointment, and subject to any appointment which should not be a complete disposition of the whole of the said trust funds, in trust for all and every the child and children of Coote H. Hutchinson and Sophia S. Hutchinson, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or marry, equally between them, if more than one, and if there should be but one such child, then the whole to such only child, but in case there should not be any children or child of the marriage, or in case there being any such, he, she, or they being a son or sons should die under the age of twenty-one years, or being a daughter or daughters should die under that age and unmarried, in trust for Sophia S. Hutchinson, her executors or administrators, for her absolute use and benefit. The settlement contained a proviso that in case any appointment should be made in pursuance of the powers thereinbefore contained, or either of them which should only extend to a part or parts of the said respective sums of £1031 13*s.* 4*d.*, £1384 12*s.* 3*d.*, £1737 12*s.* 3*d.*, and £276 18*s.* 6*d.*, and said £20,000 government stock, such appointment should be valid and effectual, notwithstanding the non-appointment of the remaining part or parts thereof; "but in that case any child entitled to a share under such appointment shall be entitled to no further share of and in the remaining or unappointed part or parts of the said respective trust moneys, stocks, funds, and securities, unless and until he or she shall have brought his or her appointed share into hotchpot, unless the person or persons making such appointment should declare a contrary intention

in writing." The settlement contained a proviso that if any of the children of the marriage, being a son or sons should die under age, or being a daughter or daughters should die under age without being or having been married, then subject to any appointment which should be made by virtue of either of the powers thereinbefore contained, the share or shares of him, her, or them so dying of and in the said respective trust moneys, stocks, funds, and securities, should go and accrue to the survivors, &c. and a maintenance clause that in case any of the children, &c. who under the trusts thereinbefore contained or under any appointment or appointments to be made in his, her, or their favour by virtue of the powers thereinbefore contained, or either of them, should be entitled to any vested, &c. share or shares of the said sums of £4430 16*s.* 4*d.*, and said £20,000, should not have attained twenty-one, &c. then it should be lawful for the trustees to apply the yearly produce of the share of each such child, &c.

There were three children of the marriage—John H. Hutchinson, Francis H. Hutchinson, and Sophia Dorothy H. Hutchinson, all of whom attained twenty-one. John married, and had two daughters, Cecil and Eleanor, both of whom were born in the lifetime of Sophia S. (otherwise Sophia H.) Hutchinson. Francis married, and had issue. Sophia Dorothy did not marry.

Coote H. Hutchinson died in 1842; there was no joint appointment.

Sophia H. Hutchinson made her will, dated the 18th December, 1878, and thereby appointed to her son John H. Hutchinson the said sum of £4430 16*s.* 4*d.*, and after reciting the settlement of the £20,000 stock, and the provision that £1000 should, after the death of the survivor of her husband and herself, be paid thereout to each child of the marriage, and that there were three children, the testatrix appointed that immediately after her death, £10,000 should be retained out of the said trust funds and paid to her daughter Sophia Dorothy H. Hutchinson, and as to the residue of the said stock after payment thereout of the said sum of £10,000 and the said sums of £1000, she appointed that immediately after her death the said residue should be transferred to trustees named in trust to pay the income thereof to her son Francis H. Hutchinson for his life, and after his decease in trust for such one or more

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of the children of the said Francis H. Hutchinson, born in testatrix's lifetime, and in such shares and proportions as the said Francis H. Hutchinson should by will direct and appoint, and in default of such direction or appointment then for such person or persons as the said Francis H. Hutchinson should by will direct or appoint: provided that if the said Francis H. Hutchinson should die without leaving any children or remoter issue him surviving, then the trustees should stand possessed of the said residue in trust to pay the income thereof to Sophia Dorothy H. Hutchinson for her life, and after her decease in trust for such of the children of the said Sophia Dorothy H. Hutchinson, born in testatrix's lifetime, and in such shares and proportions as the said Sophia Dorothy H. Hutchinson should by deed or will direct or appoint, and in default of appointment, in trust for her, her executors, administrators, and assigns: provided that if the said Sophia Dorothy H. Hutchinson should die without leaving any children or remoter issue her surviving, then the trustees should stand possessed of the said residue in trust to pay the income thereof to testatrix's son, John H. Hutchinson, for his life, and after his decease to and amongst such of his daughters born in testatrix's lifetime, and in such shares and proportions as the said John H. Hutchinson should by deed or will appoint, and in default of appointment in trust for him, his executors, administrators, and assigns. The testatrix appointed John H. Hutchinson and Henry A. Hamilton executors.

The testatrix made a codicil dated the 5th September, 1889, and thereby revoked the appointment of £10,000 government stock, and appointed that the said sum of stock should be paid to two trustees, and declared that they should stand possessed of same upon trust and to the intent that the income thereof might be paid to her daughter Sophia Dorothy H. Hutchinson, and her assigns during her life, and that after her decease the said trust funds should remain and be in trust for her child or children born in testatrix's lifetime in such shares and proportions as testatrix's said daughter should by deed or will appoint, and in default of such appointment upon trust for such child or children of testatrix's said daughter, share and share alike: provided that no such child should be entitled to any share of the unappointed part

thereof without bringing the share or shares appointed to him or her into hotchpot, unless her said daughter should by any such appointment direct the contrary: provided always that if her said daughter should die without leaving any child or children, then the testatrix appointed that her said trustees should stand possessed of the said trust funds upon trust for testatrix's granddaughters Cecil and Eleanor, daughters of her son John H. Hutchinson, share and share alike.

The testatrix died on the 30th April, 1896. Probate of the will and codicil was granted to John H. Hutchinson.

This was an originating summons taken out by John H. Hutchinson against the trustees of the settlement and Francis H. Hutchinson, Sophia Dorothy H. Hutchinson, Cecil H. Hutchinson, and Eleanor H. Hutchinson, for the determination of the following questions:—(1) Whether the appointment by the codicil of the £10,000 government stock to Cecil H. Hutchinson and Eleanor H. Hutchinson was valid. (2) Whether the appointments by the will of the residue of the £20,000 government stock subsequent to the appointment of the life estate to Francis H. Hutchinson were valid. (3) Whether in the event of Francis H. Hutchinson surviving Sophia Dorothy H. Hutchinson he would be entitled to a life interest in the dividends of the said £10,000 government stock, as forming portion of the residue appointed to him for life. (4) Whether the plaintiff and the defendants Francis H. Hutchinson and Sophia Dorothy H. Hutchinson as the only children of the marriage who attained twenty-one were entitled under the settlement and the failure of the appointments made by Sophia H. Hutchinson (other than of the life estates to Sophia Dorothy H. Hutchinson and Francis H. Hutchinson) to the said sum of £10,000 government stock and to the said residue, subject as to the former to the life interest therein of Sophia Dorothy H. Hutchinson, and as to the latter to the life interest therein of Francis H. Hutchinson. (5) Whether (if the fourth question were determined in the affirmative) the plaintiff should bring into hotchpot the said judgment moneys. (6) Whether the appointees for life should bring into hotchpot their respective life interests.

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*Stanley, Q.C.* (with him *Brady*), for the plaintiff:—

The appointment by the will of the residue of the £20,000 after the decease of Francis H. Hutchinson is void, and the fund goes as in default of appointment. The same applies to the appointment by the codicil of the £10,000, so far as it deals with that sum after the decease of Sophia Dorothy H. Hutchinson.

These appointments are bad for two reasons—(*a*) they must be read as part of the settlement, and then they contravene the rule against perpetuities; (*b*) they are attempts to delegate the power. On the first question, see *Wollaston* v. *King* (1); *Morgan* v. *Gronow* (2), and the judgment there (page 9) of Lord Selborne, L.C. Such cases as *Phipson* v. *Turner* (3) and *Slark* v. *Dakyns* (4) have no application; they are cases of wills operating from the death. *Wollaston* v. *King* (1) is explained by Stirling, J., in *Peacock* v. *Frigout* (5). *D'Abbadie* v. *Bizoin* (6) is very near the present case. On the question of delegation, see *Alexander* v. *Alexander* (7). The gift in the proviso in the codicil is also void for remoteness—it is an attempt to tie up the property for a life not in existence at the time of the settlement. The word "leaving" means "leaving at her death," not "having had."

Secondly, the appointment in the will of the residue of the £20,000 does not capture the £10,000, the appointment of which under the codicil has failed. The appointment of the residue amounts to a specific appointment of the sum not already disposed of: see Farwell, Powers (2nd ed.), pp. 250, 251, referring to *Page* v. *Leapingwell* (8).

The plaintiff, it is submitted, is not bound to bring any portion of the £4430 16*s.* 4*d.* into hotchpot. The entire of that fund was appointed to him. Where there is no hotchpot clause there is in law no such presumption as that against double portions, and an appointee takes an equal share of the unappointed funds: see 3 Davidson's Precedents (3rd ed.), Pt. 1, page 167. Here the two funds came from different sources, the trusts affecting them and the ultimate limitations are different, and the wording of the

(1) L. R. 8 Eq. 165.
(2) L. R. 16 Eq. 1.
(3) 9 Sim. 227.
(4) L. R. 15 Eq. 307.
(5) [1893] 1 Ch. 54.
(6) I. R. 5 Eq. 205.
(7) 2 Ves. Sen. 640.
(8) 18 Ves. 463.

hotchpot clause shows that it was intended to apply to each separately. This is clearly indicated by the words "or either" and "respective"; and, moreover, the clause deals with an appointment extending to part only, and declares that same shall be good; and this could not have been intended to apply to the case where the entire of one fund was appointed. It applies only where there has been an appointment of part of one fund, and extends only to the residue of that fund. The rule against double portions does not apply: *Ingram* v. *Papillon* (1). That case was taken to the Court of Appeal (2), but the question of law was not decided or discussed: see also *Earl Grey* v. *Grey* (3), and the judgment there of Romer, J.; and *Montague* v. *Montague* (4), where there were two deeds, and each had a hotchpot clause. In the present case there are practically two settlements, one of the husband's property, the other of property belonging to the wife: see *Meates* v. *Bishop* (5). The appointments for life are valid, but the appointees must bring their interests into hotchpot: *Eales* v. *Drake* (6); *Rucker* v. *Scholefield* (7); *Trench* v. *Heathcote* (8).

*Twigg, Q.C.*, for Francis H. Hutchinson:—

The appointments beyond the life interests are void, and the funds go as in default of appointment. Applying the second rule laid down by Sir W. Page Wood in *Cattlin* v. *Brown* (9) at page 375, you must ascertain the objects of a testator's bounty by construing his will without any reference to the rules of law which prohibit remote limitations; and having, apart from any consideration of the effect of those rules, arrived at the true construction of the instrument, you are to apply the rules of law as to perpetuities. It is not necessary for this purpose to go beyond the first rule laid down in *Cattlin* v. *Brown* (9), which is that the appointment is bad unless it be clear that the gift must vest in some one within a life in being and twenty-one years, and for the purpose of applying the rule, the will executing the appointment must be read into the settlement, and so reading it the gift to the two daughters of John

(1) [1897] 2 Ch. 574.
(2) [1898] 1 Ch. 142.
(3) [1897] 1 Ch. 946.
(4) 15 Beav. 565.
(5) 76 L. T. (N. S.) 186.
(6) 1 Ch. D. 217.
(7) 1 H. & M. 36.
(8) W. N. 1891, p. 10.
(9) 11 Ha. 372.

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H. Hutchinson is too remote, because it is only given to them if Sophia Dorothy H. Hutchinson should die without leaving *any* children. It is suggested that the word "such" should be read into the proviso in the codicil, but the Court refused to do this in *Pride* v. *Fooks* (1), which is very similar to the present case. The modern tendency is to read the words of a will in their natural sense; see 1 Jarm. Wills (5th ed.), p. 469; the word "any" appears to be naturally used to exclude the limitation of the class referred to.

I admit that the life estates must be brought into hotchpot, and that the appointment of the residue to Francis is an appointment of an aliquot part of the fund.

The hotchpot clause applies to the whole of the settled funds, and the plaintiff must therefore account for the £4430 16*s.* 4*d.*

*Price, Q.C.*, for the trustees of the settlement.

*O'Connor, Q. C.*, for Cecil H. Hutchinson and Eleanor H. Hutchinson:—

The appointment by the codicil of the £10,000 government stock to testatrix's granddaughters, Cecil and Eleanor, is a valid appointment; grandchildren are objects of the power. In construing the proviso under which Cecil and Eleanor take, the words "any child or children," must be read "any such child or children as before mentioned": *Smyth* v. *Power* (2); *Foster* v. *Hayes* (3); *Tarbuck* v. *Tarbuck* (4); *Tucker* v. *Baker* (5); *Ellicombe* v. *Gompertz* (6). The testatrix had the rule against perpetuities in mind when making her will, and wished to keep within it. If there is ambiguity the Court should construe the will so as to give effect to the intention of the testatrix: *Malcolm* v. *Taylor* (7); *Martelli* v. *Holloway* (8).

*Samuels, Q.C.*, for Sophia Dorothy H. Hutchinson:—

The appointments after those for life are void as contravening

(1) 3 De G. & J. 252.
(2) I. R. 10 Eq. 192.
(3) 4 E. & B. 717.
(4) 4 L. J. (N. S.) Ch. 129.
(5) 11 I. E. R. 104; 3 H. L. Cas. [106.
(6) 3 My. & Cr. 127.
(7) 2 Russ. & My. 416.
(8) L. R. 5 H. L. 532.

the rule against perpetuities. The rule, applied to cases of remoteness, is laid down by Lord Selborne, L.C., in *Pearks* v. *Moseley* (1). Here the will and codicil must be read together, and with respect to the former, while the gift is to children born in the testatrix's lifetime, the proviso is quite different, and deals with the case of there not being *any* children or *remoter issue*. As to the codicil the testatrix uses the word "such" in some places—where she intended to indicate the children before-mentioned. It is said that the grandchildren, Cecil and Eleanor, are given vested interests by the codicil; but the persons who really have vested interests are the children who under the terms of the settlement take in default of appointment. Most of the cases cited for the grandchildren are cases which turned on the words "die without issue," and they have no application to the present. The class of cases applicable here is that referred to in 2 Jarm. Wills (5th ed.), 1638, *et seq.*; see *Stephen* v. *Cunningham* (2); *Slattery* v. *Ball* (3); *Bythesea* v. *Bythesea* (4). In *Ellicombe* v. *Gompertz* (5) the words were "all *the* sons and grandsons," following a series of limitations to certain sons and grandsons, and the word "the" was equivalent to "those." It is no authority that "any" should be read "such." This case is ruled by *Pride* v. *Fooks* (6).

The plaintiff must bring the judgment moneys into hotchpot; there is only one clause dealing with this matter, and the powers therein referred to must be both the powers contained in the settlement. If a sum had been appointed to the plaintiff out of each of the funds, could it be contended that though he should bring one sum into hotchpot, he need not account for the other. The trusts as to maintenance, &c., deal with one combined fund.

*Brady*, for the plaintiff, in reply:—

It is admitted on behalf of the grandchildren that their claim can be sustained only by the insertion of words into the codicil; but in not one of the cases cited by O'Connor, Q.C., does the word "any" occur. It was not intended that they should take if any child of Sophia Dorothy H. Hutchinson were living at her death.

(1) 5 App. Cas. 714.
(2) 38 Ch. D. 183; 39 Ch. D. 426.
(3) 36 Ch. D. 508; 40 Ch. D. 11.
(4) 23 L. J. (N. S.) Ch. 1004.
(5) 3 My. & Cr. 127.
(6) 3 De G. & J. 252.

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Her children born after the *testatrix's* death could not take directly, but they might take indirectly, through their mother, *i.e.* out of any interest vested in her by the settlement, and not disturbed by the proper exercise of the power of appointment. If the appointment of the £10,000 after the death of Sophia Dorothy is inoperative, that portion of the fund goes as in default of appointment to the children of the settlors, who take vested interests under the settlement, and it is sought to add words to the codicil for the purpose of divesting those vested interests. *Pride* v. *Fooks* (1) is, in its principles on all fours with the present case, and there the earlier cases cited by O'Connor, Q.C., were referred to; see page 280. The cases relied on were cases of previous vested interests. *Ellicombe* v. *Gompertz* (2) is referred to in 1 Jarm. Wills (5th ed.), p. 449, with reference to the rule that a clear gift is not to be controlled by subsequent inaccurate words. The converse is the case here—the vested interest under the settlement is sought to be divested by the aid of introduced words. It is clear from the will that the grandchildren, Cecil and Eleanor, were intended to take only on failure of the wider class of children of Sophia Dorothy born at any time. That appointment is too remote.

The hotchpot clause does not apply, the two funds are not blended for that purpose, and the ordinary rules of law must prevail. There is no presumption of law in favour of equality in such cases, or rule of equity that an appointee must bring his appointed share into hotchpot. The rule is the other way—there must be an express and clear direction to exclude an appointee from the unappointed part. The words "no further share . . . of the said respective trust moneys," show that the clause must be read distributively: "powers . . . or either of them" are referred to, and the words "no further" relate to the same fund.

July 22.

THE VICE-CHANCELLOR:—

The questions submitted for decision in this case arise upon the will of the Hon. Sophia Hely Hutchinson, and the codicil thereto, so far as they operate as appointments under the power contained in the settlement on her marriage with the Hon. Coote Hely

(1) 3 De G. & J. 252. (2) 3 My. & Cr. 127.

Hutchinson. The trust funds of that settlement consisted of £4430, the property of the husband, secured by certain judgments therein mentioned, and £20,000, the property of the wife. These funds were vested in trustees upon trusts to pay the income from the £4430 to the Hon. Coote H. Hutchinson for his life, and from his death to Sophia H. Hutchinson for her life, and from the death of the survivor in trust for all or any one or more of the children, or the grandchildren or other issue of the marriage to be born in the lifetime of the husband and wife, or one of them, for such interests either present or future, and in such shares, and subject to such conditions and limitations in favour of any others of said children, grandchildren, or other issue as the husband and wife, or the survivor of them, should, by deed or will, appoint, and in default of appointment, for all the children of the marriage at twenty-one, or marriage, in equal shares, and in case there should not be any child who should attain twenty-one, or, being a daughter, should marry, in trust for the husband, his executors, administrators, or assigns, absolutely. And as to the sum of £20,000 in trust, out of the income to pay the wife £200 a year for her separate use, and as to the residue of the income during the life of the wife, and the whole thereof after her death, leaving her husband surviving, to pay the same to the husband for his life, and in case the wife should survive to pay the whole of the income to her for life, and from the death of the survivor to pay out of the £20,000 the sum of £1000 to each of the children, as to sons on attaining twenty-one, and as to daughters on attaining that age or being married; and as to the residue of the £20,000, in trust for all or any one or more of the children or the grandchildren or other issue of the marriage, such other issue to be born in the lifetime of the husband and wife or one of them, for such interests and in such shares, and subject to such conditions and limitations in favour of any others of the said children, grandchildren, or other issue, as the husband and wife, or the survivor of them, should, by deed or will, appoint, and in default of appointment, in trust for all the child or children, as to sons at twenty-one, and as to daughters on attaining that age or being married, in equal shares if more than one, and if there should be but one such child then the whole to such only child, but in case

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there should not be any children or child of the marriage who, if a son, should attain twenty-one, or, if a daughter, should attain twenty-one or be married, in trust for the wife absolutely. The deed then contains a clause in the nature of a hotchpot clause, that in case any appointment should be made which should only extend to a part or parts of the said respective sums composing the £4430 charged as therein aforesaid, and said £20,000 consols, such appointment should be valid, notwithstanding the non-appointment of the remainder, and in that case any child entitled to a share under such appointment should be entitled to no further share of the unappointed part of the said respective trust moneys, stocks, funds, and securities unless or until he, or she, should have brought his, or her, appointed share into hotchpot, unless the person making the appointment should declare a contrary intention in writing. Then follow provisions for the maintenance of any children, grandchildren, or other issue of the marriage during minority, and other clauses not bearing upon the questions now to be decided.

There were three children of the marriage — John H. Hutchinson, the plaintiff in this summons, Francis, and Sophia Dorothy.

Coote, the husband, died in the year 1842. John had two daughters—Cecil and Eleanor, who were born in the lifetime of the wife, and are defendants in the summons. Mrs. Coote H. Hutchinson died in the year 1896, leaving John, Francis, and Sophia Dorothy surviving, and her two granddaughters, Cecil and Eleanor.

She made her will dated the 18th December, 1878, and a codicil thereto dated 5th September, 1889, and on these the questions arise.

By her will she referred to the settlement, and in exercise of her power she appointed the said sum of £4430 and the stock in which it had been invested to her son John. She then proceeded to deal with £17,000, being the residue of the £20,000, after payment of the three sums of £1000 provided by the settlement for the children of the marriage, and she appointed £10,000 thereof to her daughter Sophia, to be paid her immediately on her own death, and as to the residue of the said sum of £20,000, after

payment thereout of the said sum of £10,000 and the several sums of £1000, she appointed that immediately after her death this residue should be paid or transferred to the plaintiff and H. A. Hamilton in trust to invest, and pay the income thereof to her son Francis for his life, and from his decease as to said residue in trust for such one or more of the children of said Francis born in her lifetime, and in such shares as Francis should by will appoint, and in default of such appointment, then for such person or persons as Francis should by will direct or appoint; provided that if Francis should die without leaving any children or remoter issue him surviving, the trustees should stand possessed of the said residue in trust to pay the income thereof to Sophia Dorothy for her life, and after her decease in trust for such of the children of Sophia Dorothy born in the lifetime of the testatrix, and in such shares as Sophia Dorothy should by deed or will appoint, and in default of appointment, in trust for Sophia Dorothy, her executors, administrators, and assigns. Provided that if Sophia Dorothy should die without leaving any children or remoter issue, her surviving, then the trustees should hold the same in trust for the plaintiff John for life, and after his decease for such of his daughters born in the lifetime of the testatrix, and in such shares as John should by deed or will appoint, and in default of appointment, in trust for John, his executors, administrators, and assigns.

By the codicil the testatrix revoked the said appointment of the £10,000 to her daughter, Sophia Dorothy, and in pursuance of the power mentioned in her will she appointed that, immediately after her death, the said sum of £10,000 should be held in trust that the income thereof might be paid to her daughter Sophia Dorothy, and her assigns, during her life, and from her decease the said trust funds should remain and be in trust for her child or children born in the lifetime of the testatrix in such shares and proportions as her said daughter should by deed or will appoint; and in default of such appointment upon trust for such child or children of her said daughter, share and share alike. Then follows a hotchpot clause, and after that comes this proviso, that if her said daughter should die without leaving any child or children, then the trustees should stand possessed of the said

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trust funds upon trust for her granddaughters, Cecil and Eleanor, absolutely.

There is no question as to the validity of the appointment by the will to John of the £4430, nor of the appointment thereby to Sophia of the £10,000, but as to the residue it is contended that the appointment of it after the life interest to Francis, as to which there is no question, is void first for remoteness, and secondly as to the attempted delegation to Francis of a power that could only be exercised by the husband and wife (the settlors), or the survivor of them.

The rule against the creation of perpetuities prohibits the limitation of property beyond the life of a person *in esse* at the time the instrument, whether it be will or deed, which contains the limitations and twenty-one years from the death of such person, takes effect. This rule must not be taken into consideration in construing the instrument, which must be guided by the ordinary rules of construction. When the construction has been determined, then the rule is to be applied in order to measure the interest which on such construction has been ascertained in order to see if it exceeds the length of the rule, and if it so exceeds, then it is void. Here the instrument from which the duration of the interest is to be measured is the settlement on the marriage, which contains the power of appointment. The appointment made under that power is to be referred back to, and, as it were, read into the settlement giving the power, and construed as if the interests which the appointment purports to confer were expressed in the settlement, just as if they were written therein. The rule then is applied to ascertain whether this compound creation of the interests exceeds the life or lives of a person or persons in being at the date of the settlement, and twenty-one years and a few months after the death of such persons.

The settlement and the will thus read together create trusts of the £20,000, and limit the same in the following manner, viz. to pay £200 a year to the wife for the joint lives of herself and her husband, and subject to this to pay the income to the survivor of them for life, and to pay £1000 to each of their children, and after the death of the survivor of the husband and wife to pay the £10,000 to Sophia, and to hold the residue in trust for Francis, a son of the

marriage, for his life, and after his decease for such one or more of the children of such son born in the lifetime of the testatrix, and in such shares, &c. as this son should by will appoint, and in default of appointment for such persons generally as the same son should by will appoint; and if this son should die without leaving any children or remoter issue him surviving, then to Sophia Dorothy for life, and upon her death upon trusts for her children born in the life of the testatrix, as Sophia Dorothy should appoint, with other trusts which it is unnecessary again to mention. Now, applying the rule against perpetuities to this, it cuts off these limitations and trusts at the death of the first taker, Francis, for the trust for his children could not take effect till after his death, which would be a limitation to the children of an unborn person, and the appointment to his children could only be by his will. The appointment is exclusive, and there is no gift either express or implied to children unless and until the testamentary appointment should take effect, which would not be till the death of Francis. I am therefore of opinion that the limitations subsequent to the life interest are void for remoteness.

There is an additional objection to the validity of these limitations, namely, that they purport to give a power of appointment to Francis, which would be a delegation of the power, given by the settlement to the husband and wife, or the survivor, to a child of the marriage, which is unauthorized by the power, and therefore void. There is, therefore, on this ground also, a failure of the trusts subsequent to the life interests to Francis and Sophia Dorothy.

I come now to the codicil which revoked the appointment of £10,000 to Sophia Dorothy, and in lieu thereof appointed the income of the same to Sophia Dorothy for life, and then to her children born in the lifetime of the testatrix in such shares as Sophia Dorothy should appoint by deed or will, and in default of such appointment to such child or children of Sophia Dorothy, "such" meaning "born in the life of the testatrix," and in default of appointment to "such" child or children, such having here also the same meaning, share and share alike, provided that if her said daughter should die without leaving any child or children, then in trust for the testatrix's granddaughters, Cecil

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and Eleanor. The appointment of a life interest to Sophia Dorothy is of course valid. The appointment which immediately follows it to the children of Sophia, born in the lifetime of the testatrix, if it stopped there, would also be free from objection. It is not the same as the appointment of the residue by the will, namely, to such children of Francis as Francis should appoint, but a direct appointment to all the children born in the lifetime of the testatrix, leaving it to Sophia only to appoint the shares in which they should take. This appointment is separable from the appointment to the children, and is void as being a delegation of the power, leaving the appointment to the children unaffected. The codicil may therefore be construed as if this delegated power was not contained in it, namely, as an appointment to the children of Sophia born in the lifetime of the testatrix, but subject to the proviso that if Sophia should die without leaving *any* child or children, then in trust for Cecil and Eleanor. The question then arises whether this is to be construed literally as an appointment to them in the event of Sophia not leaving any children born at any time, or is to be construed as in default of any such children as before mentioned, namely, children born in the life of the testatrix. The testatrix appears to have had before her mind that there was a rule against perpetuities, which she intended to escape from by limiting her appointments to grandchildren born in her life, but not to have had any clear notion on the subject beyond this, that she might go so far as to include her grandchildren born in her lifetime as objects of appointment. It may be fairly assumed that her intention was of necessity confined to them, and that she meant that if there were none of the class of grandchildren fulfilling this description, this fund should go to other objects of the power.

The principle applicable to such cases is clearly laid down by Lord Cottenham in the important case of *Ellicombe* v. *Gomperts* (1) thus :—" Provision is made for certain members of a class answering a particular description, and then a gift over is made upon the failure of the class. If it be clear that the whole of the class were not to take, the gift over, though made to depend upon the failure

(1) 3 My. & Cr. 127.

of the whole class, will be construed to take place upon the failure of that description of the class, who were to take; and, on the other hand, if it appears that all the class were intended to take, although some only are enumerated, and the gift over be upon the failure of the whole class, the Court will adopt such a construction as will extend the benefit, in the best way the law will admit, to the whole class." The question most frequently arises where the distinction exists between children and issue, but the principle is of more general application. Now here the words "child or children" are used both in the prior gift and the gift over; but in the prior gift the children forming the class are limited to children born in the lifetime of the testatrix, while in the gift over they are not in terms so limited but are stated to be "any child or children." It is clear that the whole class of children were not intended to take under the prior gift but only those who should be born in the lifetime of the testatrix; and therefore upon the principle I have referred to, the gift over is to be construed as applying only to the failure of the children of the description who were to take under the prior gift. The use of the word "any," which was much relied on, is not enough to take the case out of the principle; and in *Ellicombe* v. *Gompertz* (1) the words "after the decease of *all* the sons and grandsons" were not allowed to preclude its application, and they are stronger than, or at least as strong as, the word any. It would be useless to go through the cases on this subject, as I am of opinion that the rule laid down in *Ellicombe* v. *Gompertz* (1) applies to the present case. The giving this construction to the language of the codicil prevents the gift over to Cecil and Eleanor, failing for remoteness. I therefore hold that the appointment to them of this £10,000 is a valid exercise of the power of appointment.

The remaining matter to be considered is whether the plaintiff is bound to bring into hotchpot under the hotchpot clause in the settlement the sums representing the £4430 appointed to him by the will, and whether the tenants for life of the other funds are similarly bound as to their life interests. There is no doubt as to the latter; but it was contended for the plaintiff that he is not so

(1) 3 My. & Cr. 127.

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bound, on the ground that the hotchpot clause is to be held applicable separately to the £4430 on the one hand, and to the £20,000 on the other. This contention was based upon the use of the word "respective," which is said to have the effect of dividing the subjects to which it applies into two parts, namely, the respective sums composing the investments of the £4430 as one part, and the £20,000 as the other. In my opinion this is an impossible construction, for it seems to me plain that the whole of the trust funds were intended to be affected by this single clause. The different sums which were put in settlement are stated, including the components of the £4430 and the sum of £20,000, and all are made subject alike to this condition. It is a very different case from *Montague* v. *Montague* (1), where there were two separate settlements, each with its own hotchpot clause applying to the property thereby settled. The fact that these funds came from different parties is, in my opinion, in itself immaterial. There seems to have been a plain intention that this single hotchpot clause should apply to all the funds without distinction. In the case of *Earl Grey* v. *Grey* (2) there was no such indication of intention, and the question was whether a hotchpot clause was incorporated by a general reference to the trusts, powers, provisoes, and agreements expressed in reference to another and distinct fund.

I therefore hold that the plaintiff and the other appointees are bound to bring into hotchpot all the interests they take in the settled funds.

Solicitors for all parties: *T. T. Mecredy & Son.*

D. M'C. M.

(1) 15 Beav. 565.

(2) [1897] 1 Ch. 946.

## IN RE BROWN, DECEASED.
## PADEN *v.* FINLAY.

(1898. No. 134.)

*M. R.*
1898.
March 2.

*Will—Bequest—Charity—Christian Brethren—Religious objects—Charitable organization.*

Bequest of "one hundred pounds sterling to the Christian Brethren, in trust of A. B. and C. D. one year after my death."

*Held*, a valid charitable gift.

ORIGINATING SUMMONS.

A testator by his will, dated the 19th of March, 1886, after other dispositions, made the following bequest:—"I leave one hundred pounds sterling to the Christian Brethren, in trust of Isaac Finlay, Newtownards, and J. C. Graham, secretary now to the Building Society, Waring-street, Belfast, one year after my death."

The testator died on the 11th of November, 1896, and probate of his will was granted to the plaintiff, one of the executors therein named.

The plaintiff issued a summons under Order LV. for the determination of the question as to the validity of this bequest. The testator had no real estate at the time of his death. There were sufficient funds in the hands of the executor to pay the legacy to the Christian Brethren if it were declared valid.

The affidavits in the case stated that the testator was at the date of his will, and for many years prior thereto, a member of the Church or Christian Body referred to in his will by the name of the "Christian Brethren." Isaac Finlay and J. C. Graham were also members of this Church or Christian Body. It was called or known by the name of "Christian Brethren" or "the Brethren," and the name of "Plymouth Brethren" was sometimes applied to it by persons not belonging to this Christian Body. In the official returns of the Registrar-General the Body was

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mentioned among other religious denominations as the "Brethren" or "Plymouth Brethren."

In the affidavit of the plaintiff he stated that so far as he had been able to ascertain the Body referred to by the testator as "the Christian Brethren" was a large fluctuating and undefined body of persons in different parts of the United Kingdom and abroad, commonly known as "Plymouth Brethren," having no central or local organization for charitable purposes, but meeting together for religious services and worship.

In the joint affidavit of Isaac Finlay and J. C. Graham in reply it was stated that the "Brethren" formed a "definite, distinct, and well-known Body holding evangelical views of religion and having branches in very many, if not all, of the towns and cities of the United Kingdom, where they hold weekly and other meetings for worship and preaching." It stated that the Bible was the rule of faith and practice adopted by them, and that they were only "fluctuating" in the sense that other denominations were. It further stated that in 1896 they expended between £13,000 and £14,000 in foreign missions.

*Watts*, for the plaintiff, submitted the question for decision.

*W. H. Brown*, for the residuary legatees :—

The bequest is void for uncertainty. There is nothing on the face of the will to show what are the objects of the body described as "Christian Brethren." It is a devise to individuals, and a bequest intended to benefit individual members of a religious community is not charitable. Tudor on Charities, p. 9 ; *Stewart* v. *Green* (1).

In *Hogan* v. *Byrne* (2) a devise to "Christian Brothers" was held void.

*Chambers*, for Isaac Finlay and J. C. Graham :—

This is a valid charitable gift, and so not void for uncertainty.

(1) Ir. R. 5 Eq. 470, 477. (2) 13 Ir. C. L. R. 166.

There was no idea in the testator's mind of conferring any personal benefit on the individual members of the Christian Brethren. This is a gift for the objects of the Christian Brethren, which by the affidavits are proved to be what the law recognizes as charitable. The gift, then, is for general religious purposes, for the advancement of religion, and objects of public benefit. And if the Court can collect from the words of the will a charitable intention it is sufficient.

*Hogan* v. *Byrne* (1) was an ejectment on the title, and the question there was as to the legal estate, *i. e.* whether there was a legal devise so as to pass the land; and the construction put upon the will in that case favours our contention. If the real meaning of the testator is a gift for charitable purposes it is sufficient. See judgment in *Morice* v. *Bishop of Durham* (2).

There is no question that the Court can hold a bequest of this sort to be a valid charitable bequest. It is a gift to the Christian Brethren to be used for the promotion of their objects, and there is no uncertainty as to what their objects are: *Attorney-General* v. *Lawes* (3); *Cocks* v. *Manners* (4). In *Dawson* v. *Small* (5) a gift to poor pious persons of the Methodist Society, in a particular place, was held to be a valid charitable gift; and so also in *Shrewsbury* v. *Hornby* (6), a bequest for the assistance of respectable Unitarian congregations who stood in need of it, in the discretion of the trustee. See also *Attorney-General* v. *Hickman* (7); *Waller* v. *Childs* (8); *Nightingale* v. *Goulburn* (9): *Re Barnett* (10).

THE MASTER OF THE ROLLS :—

This matter comes before me on summons under Order LV. for determination of a question as to a gift of £100 in the will mentioned in the summons.

The facts are stated in two affidavits by the plaintiff, and

(1) 13 Ir. C. L. R. 166.
(2) 10 Ves. 522, at p. 542.
(3) 8 Ha. 32.
(4) L. R. 12 Eq. 574.
(5) L. R. 18 Eq. 114.
(6) 5 Ha. 406.
(7) 2 Eq. Cas. Ab. 193, pl. 14.
(8) Amb. 524.
(9) 5 Ha. 484.
(10) 29 L. J., Ch. 871.

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one affidavit of the defendants. The plaintiff states that "Alexander Brown, formerly of Craigantlet, in the county of Down, and afterwards of Holywood, in the same county, retired farmer, died on the 11th November, 1896, having first duly made and executed his last will, dated 19th March, 1886. By his said will the deceased appointed John H. Bennett and me his executors." Bennett renounced, and probate was granted to the plaintiff. "By his said will the testator, among other bequests therein contained, made the following bequest:—'5th, I leave one hundred pounds sterling to the Christian Brethren in trust of Isaac Finlay, Newtownards, and J. C. Graham, secretary now to the Building Society, Waring-street, Belfast, one year after my death,'" and upon the validity of that bequest the present question turns. I at first fell into the error of supposing that the "Christian Brethren" mentioned in the will were the same as the "Christian Brothers," but that is not so. The testator then bequeaths half of the residue to the "female department" of his sister Agnes' family in certain terms, and the other half to the female department of his brother David's family in like manner. This affidavit states that the personal estate of the testator has been realized, and the net amount is £968 16*s.* 3*d.* There is no real estate. The plaintiff has in his hands as executor the sum of £100 available for payment of the legacy to the Christian Brethren, but he says that he has been advised that the validity of this legacy is very doubtful, and he has accordingly taken these proceedings to obtain the guidance of the Court. In paragraph 4 of his affidavit he states:—"So far as I have been able to ascertain the body referred to by the testator in his said will as 'the Christian Brethren' is a large, fluctuating, and undefined body of persons in different parts of England, Ireland and Scotland, and abroad, commonly known as 'Plymouth Brethren,' having no central or local organization for charitable or other purposes, but meeting together for religious services and worship. I am informed and believe that the testator Alexander Brown was a member of the said Christian Brethren, and that the said John Clarke Graham and Isaac Finlay are also members thereof." A letter was written to these defendants by the plaintiff's solicitor, and he refers to their answer. He then sets out the names of those who are the "female

department" of the sister and brother of the testator. The affidavit does not raise any question as to what body it is that is meant by "Christian Brethren" meeting for worship. It does state that they are merely individuals having no central organization: and there is no dispute as to what the body is. The affidavit of Isaac Finlay and J. C. Graham states that testator and the deponents were at the date of the will, and for many years prior thereto, members of the Church or Christian Body referred to in the will by the name of the "Christian Brethren." "The Church," they say, "is called or known by that name, and amongst the members thereof shortly as 'the Brethren.' The name 'Plymouth Brethren' is sometimes applied to it by outsiders not belonging to the body." They are recognized in the official returns of the Registrar-General.

There might be some difficulty, if it were not a common case that it is so, in knowing whether they are even called "the Christian Brethren." "The Brethren," they say, "form a distinct, definite, and well known body holding evangelical views of religion, and having branches in very many, if not all, of the towns and cities of the United Kingdom where they hold weekly and other meetings for worship and preaching. The Bible is the rule of faith and practice adopted by them. They are only 'fluctuating' in the sense in which other denominations are . . . In the year 1896 they expended between £13,000 and £14,000 in foreign missions." The pamphlet which is referred to does not describe the body in any place as the "Christian Brethren" or "Brethren," but it is not disputed that it is the organ of this body.

The question is whether the gift is void for uncertainty, or whether it is a valid charitable gift: because if it is a valid charitable gift the uncertainty of the objects would be immaterial. At the outset of the case it occurred to me that there was great difficulty in holding this to be a valid charitable gift. The body is a large and fluctuating one. It has thousands of members not only in the United Kingdom, but also in all parts of the world, and the gift in the will does not state anything as to the objects of the Christian Brethren. It is a gift simply to trustees in trust for the Christian Brethren. If it was intended that they should take

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as individuals, which would be the ordinary grammatical meaning, the gift would be void for uncertainty. It would be impossible for the trustees to obtain a release or discharge—there would be no charity at all, but simply a gift to *personæ designatæ* impossible to ascertain, and thus void for uncertainty. The question really is whether that was the testator's meaning, or, without speculating what his meaning was, whether a different meaning may not be gathered from the language he has used. The question is whether the gift is not really a gift for the Christian Brethren as an organization, including the purposes and objects they promote. On the face of the will, then, which of these constructions is to be adopted as distinguished from the other?

*Hogan* v. *Byrne* (1) was decided in 1862 by the Court of Common Pleas, which had at that time a purely common law jurisdiction, and the decision was arrived at without consideration of trusts, charitable or otherwise. In that case there was a gift to the "Christian Brothers," in these terms:—"I will my house and garden, out-office, lawn, to monks named 'Christian Brothers,' and £100 in order to pay their rent." It turned out that there were about 200 "Christian Brothers" scattered through the kingdom, and the question was, as regards the devise of land, whether this was a good devise at common law, so as to vest the legal estate in all these monks. There was no trustee. It was argued that the lands vested in all the Christian Brothers, in number 200, or thereabouts, as joint tenants. On the other side, it was contended that this was not so, but that it was void for uncertainty, and this was the view the Common Pleas took. At page 172 of the report, Monahan, C.J., says—"There is, on the face of the will, no particular reference to any individual members of the society; and seeing that there are about forty of these establishments in Ireland and England, about thirty-five being in Ireland, with from three to seven members in each—if we were to hold that this was a devise to the individual monks in their individual capacity, we must either hold it void for uncertainty, there being nothing to distinguish, by residence or otherwise, any one establishment of these monks from any other; or

(1) 13 Ir. C. L. R. 166.

we must hold that it was a devise to all the monks of the several establishments and their heirs as joint tenants—in other words, that this house and garden should vest in some two hundred persons for their individual benefit. This we think so inconsistent with the nature of the property and the situation and circumstances of the members of this order, that we think we would be acting altogether contrary to the intention of the testator if we were so to hold. We entertain no doubt that what the testator intended was, that the property should vest in the order as such, bound by the rules of the order, as stated in the evidence; and that it never was the intention of the testator that any individual of the order should have any personal benefit therefrom." Pausing there, if that was clear as regards the question of intention, what are we to say in this case as regards the intention where there are many thousands of members scattered over the habitable world? If it was impossible to conceive in that case that the testator intended a gift to the monks in their individual capacity, and it was held that the testator had not intended a personal benefit, *a fortiori*, in this case, the testator did not intend personal benefit. "And such," continues Monahan, C. J., "in our opinion, having been the intention of the testator, we consider we are bound to hold such to be the construction of his will; and, therefore, that same is void, the order, as such, not being capable of taking lands by purchase. We have been referred to some cases in the Court of Chancery, in which, from the report, it would appear that devises and bequests to monks were upheld: of these cases it is sufficient to say, it became in these cases unnecessary to decide whether the devises passed a legal estate. The Court was of opinion that a charitable trust was created, and, therefore, it was a matter of no consequence whether the legal estate was in the devisee or heir-at-law, as in either case the estate was held bound by the trust and though, in some of those cases, expressions may be found, from which it might be inferred that the opinion of the Court was, that legal estates passed to individuals, we cannot consider these cases as authorities to bind us in a case like the present, where we have nothing to do with any charitable trust that may have been created. If any such is supposed to exist in the present case, the Court of Chancery is the only Court

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to deal with it. We merely decide that no legal estate passed by the will, and, therefore, that the verdict had for the plaintiffs, one of whom is the heir-at-law of the testator, must stand." Apply that to the present case. In the first place, it is not a direct authority, so far as the decision goes, because the question there was as to the legal estate in lands; but as to the construction of the language in this will, it appears to be an authority in favour of holding that it is impossible that the gift could be intended for individuals; and that the testator must have intended somethin g charitable, and appointed trustees for that purpose. What other object, then, could there be except to apply the money for the trusts and objects of the Christian Brethren? There is not much light to be obtained from the cases. *Attorney-General* v. *Lawes* (1) was cited, where there was a direction to pay a sum into bank for the use of certain poor clergymen and other members of the Irvingites. It is not a case exactly in point. There is an obvious distinction. The Vice-Chancellor held "that the bequest was not less a charitable bequest, from the fact that it was given for the benefit of a limited class of persons," that is, certain poor and persecuted ministers, etc.; "that it was not the less a charity because it was confined to those members of a particular class of persons who were subject to certain grievances, and not to the class at large, and that the bequest, being once declared valid as a charitable bequest, the Court would not permit it afterwards to drop for want of objects, but would administer the fund *cy près*." The difficulty that pressed the Court there was that the objects of the bequest had to be picked out of a large body, which, in a case like the present, does not arise; and there can be no doubt that the Vice-Chancellor would (according to that decision) have held the present gift to be a valid charitable bequest. *Cocks* v. *Manners* (2) is not in point.

Treating the question on general principles as a gift for public worship and the religious and charitable objects carried out by the Christian Brethren, it would be undoubtedly a valid charitable gift. Once I come to the conclusion, as I do, that it is impossible to believe that the testator intended to confer pecuniary benefit on

(1) 8 Ha. 32. (2) L. R. 12 Eq. 574.

individuals, I have no hesitation in holding that this is a valid charitable bequest.

Under the circumstances of this case I shall allow the costs of all parties out of the residue of the estate.

Solicitors for the plaintiff: *C. & J. Black.*

Solicitors for the residuary legatees: *Moorhead & Wood.*

Solicitors for Messrs. Finlay and Graham: *R. Kelly & Son.*

R. W. L.

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## IN RE CRANSTON, DECEASED.
## WEBB *v.* OLDFIELD.
## (1897. No. 1022.)



*Will—Devise—Perpetuity—Charitable gift—Vegetarian society.*

By her will a testatrix (after giving a life estate therein) devised portion of a perpetual yearly rent, issuing out of certain hereditaments and premises, to the trustee, treasurer, or other proper officer from time to time of the L. and M. Vegetarian Societies, in equal moieties, for the use of the said respective Societies, to be paid to them for ever. The Vegetarian Societies advocated the disuse of animal food and the use of fruits and vegetables for sustenance of life. Their objects were to put a stop to the slaughter of living creatures for food, which practice they thought was inconsistent with the rights of animals, was needlessly cruel to them, and had the result of producing demoralizing effects upon men. By advocacy of these principles the adherents of the Societies, according to their rules, aimed at securing the intellectual and moral improvement of men, as well as the physical benefit of men and inferior animals:—

*Held*, by the Master of the Rolls, that the object of the Societies might be fairly described as charitable within the principle of decided cases, and that there was a valid gift to the two Societies in equal moieties.

Decision of Porter, M.R., affirmed by the Court of Appeal; Holmes, L.J., *dissentiente*.

ORIGINATING SUMMONS.

By her will dated 2nd December, 1893, Agnes Sinclair Cranston, after reciting that she was entitled to a perpetual yearly rent of £193 12*s.*, payable out of certain hereditaments and premises in the city of Belfast, devised and bequeathed to Josefa Hollrigal, the yearly sum of £100 sterling, portion of said rent, the same to

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accrue due to her from the date of the decease of the testatrix and to be paid to her during her life on her own receipt without power of anticipation or alienation, and after her decease testatrix devised "the said portion of said rent to the trustees, treasurer, or other proper officers, from time to time, of the London Vegetarian Society and the English Vegetarian Society established in Manchester, in 1847, to be paid to them for ever according to the gale days thereof in equal moieties, for the use of the said respective societies." She also bequeathed the following legacies:—To the London Society for the protection of animals against cruelty, £800; to the London Society for the total abolition of vivisection, £400; to the Belfast Free Library, £400; and to the Belfast Society for the protection of animals against cruelty, £400.

Testatrix devised and bequeathed all the residue of her real and personal estate (exclusive of certain property mentioned), according to the nature and tenure thereof, unto her trustees, thereinafter mentioned, and to the survivors and survivor of them, their, and his heirs, executors, administrators, and assigns, upon trust after payment of debts and legacies provided for by the will, for certain residuary legatees, and appointed Charles Webb, Thomas Gerrard, and John Campbell White trustees and executors of her will.

By a codicil to her will, dated 20th February, 1895, testatrix devised and bequeathed the yearly sum of £93 12*s.*, portion of the perpetual head-rent of £193 12*s.*, mentioned in her will, to Panagiotes Kologeropoulos for life, and after his decease, to the London Vegetarian Society in the way provided by her will as regards the other portion of the perpetual rent devised to it.

Testatrix died 9th March, 1895, at Athens, and probate of her will and codicils were, on 12th June, 1895, granted to the plaintiffs, Charles Webb and John Campbell White, the other executor named in the will having predeceased the testatrix.

The plaintiffs issued an originating summons, dated 7th December, 1897, for the determination of certain questions arising in reference to the will of the testatrix, and the matter having been adjourned into Court, came on for hearing on the 28th January, 1898. The main questions arising for decision were as to the validity of the devises of the perpetual yearly rent of

£193 12*s.* (after the determination of the life estates mentioned in the will and codicil) to the Vegetarian Societies.

The definition of the London Vegetarian Society, as stated in its report of 1896, was as follows:—"The London Vegetarian Society shall be defined as a combination of such individuals as may be willing to unite together for the promotion of Vegetarianism, *i.e.*, abstinence from the flesh of animals (fish, flesh, and fowl), as food, and the encouragement of the use of seeds, pulses, grains, fruits, nuts, and all other wholesome products of the vegetable kingdom." The objects of the organization were stated to be: "(*a*) to extend and organize Vegetarianism by the work of its members and associates, and the co-operation of its associated societies; (*b*) to promote fraternal intercourse between London Vegetarians, whether as individuals, or as members of societies."

The aims of the Manchester Vegetarian Society, as stated in the rules adopted at a general meeting, in 1886, were as follows:—"To advocate the total disuse of the flesh of animals (fish, flesh, and fowl) as food, and to promote instead a more extensive use of fruits, pulse, cereals, and other products of the vegetable kingdom, and to disseminate information on dietetic reform by means of a magazine, or other publications, lectures, essays, letters to the press, and other opportunities as they arise, bearing upon the many physical, intellectual, moral, social, and other advantages resulting from Vegetarian habits of diet; and by these means and through the example and efforts of its members to extend the adoption of a principle tending essentially to true civilization, to universal humaneness, and to the increase of human happiness generally."

*Samuels, Q.C.*, for the executors and trustees of the will.

*Gordon, Q.C.*, and *Hume*, for the London Vegetarian Society.

*Serjeant Dodd*, for the Manchester Vegetarian Society.

*Stanley, Q.C.*, and *Jefferson*, for the residuary legatees and devisees.

*Herbert Wilson*, for a specific legatee.

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THE MASTER OF THE ROLLS :—

The main questions for determination are as to the gifts to the Vegetarian Societies contained in the will and codicil. They are not legacies of lump sums of money to be paid down at once or spent in a few years, but gifts of portions of a fee-farm rentcharge issuing out of lands, and specifically described in the will as such.

It is necessary to decide two questions; first, whether the gifts are in the nature of perpetuities, and secondly, whether they are or are not charitable.

Mr. Gordon, for the London Vegetarian Society, was placed in this difficulty in presenting the case of his clients, that, as regards their claim under the codicil which was executed only a month before the death of the testatrix, the gift, being of real estate, if held to be charitable, would be defeated by the statute. It was his interest as to it, therefore, to contend that it was not a perpetuity and not charitable. But, as regards the gift to his clients under the will, it was his interest to argue that the gift was charitable if it be a perpetuity. I have, however, already indicated my opinion on this question of perpetuity, and I have no doubt that the gifts are both in the nature of perpetuities, and therefore void unless the objects are such as the law recognises as charitable. I arrive at this conclusion, not from anything in the constitution of the societies or the tenure of their officers, but from the nature of the property itself. It is my opinion that the trust was intended to last for ever. Each particular gale of this rentcharge, as it comes in, is impressed with a trust to the end of time. Mr. Gordon suggested that the annuities might be sold, and if converted into money, that money might be spent forthwith. But the rentcharge could not be sold for the reason that it is itself impressed with a trust, whether charitable or not. The trustee has no power to release the trust and so give title to it. Therefore, so far as the gift in the codicil is concerned, it goes by the board, because if not charitable, being a perpetuity, it is void; and if it be charitable, it is void under the statute.

The more important and interesting question remains, whether the gifts are charitable or not? As in so many cases this question depends not so much on the definition or description of the objects contained in the will as on the constitution and objects of the

societies in whose favour the bequests are made. There is no question as to what societies are meant by the description in the will and codicil. Under Order LV. it would have been open to the trustees, if there was any doubt as to the identification of the societies, to ask for the directions of the Court: but no such directions have been applied for because the two societies are sufficiently designated. One is the London Vegetarian Society, and the other is a Vegetarian Society described in the will as connected with Manchester. The question then is whether the gifts to them, to be used for the purposes of their organizations and objects, are charitable or not? There would be great difficulty on a strict construction of the charitable objects enumerated in the first Irish Poor Law Act of Elizabeth in bringing these societies within its purview. In the days of that monarch, Vegetarian Societies had no existence, and one could not expect to find them specified; but these objects have received a wide construction. We have gone much further than the words of that statute; and the tendency of late years has been where a testator dedicates part of his property towards an object which is not illegal in itself, to give effect to the intention unless there is some coercive reason to the contrary. There is nothing in this case to induce me to lean at all towards defeating the gifts as not being beneficial to the public at large. Whether an object of this sort is charitable or not does not depend on the private feeling or opinion of the judge who has to decide it. The question is altogether apart from the views of the particular tribunal. To take an obvious illustration, it is impossible for a judge to be personally convinced that all forms of religion are equally beneficial, and he may think some to be positively erroneous. Yet each judge is bound to give effect to religious objects, whether he approves of them or not. Jewish charities, for instance, are protected in our Courts just as any others. In each particular case the question is what is the object with which the testator made the gift? The case is the same where considerations not religious arise. I confess I have often felt a difficulty in following the earliest decision which established that a gift to a society for prevention of cruelty to animals was charitable; because however right and proper such an object was, it was not in my view, until the decision on the question, charitable, because benefit to the human race was not, primarily

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at least, the object of the gift, though the cultivation of a spirit of humanity and mercy towards the inferior animals must have an elevating effect on human beings. It is now, however, the law that gifts to societies for the prevention of cruelty to animals are good as being charitable, and will be supported; not losing sight of the aspect connected with benefit to the inferior creation, but mainly on account of the effect on the human race. That was extended by the Vice-Chancellor in this country, and by the Court of Appeal in England to the case of a gift for the prevention of vivisection; and it must be taken as law that gifts for that purpose, though perpetuities, are valid. And not chiefly because they aim at preventing unnecessary cruelty to inferior creatures, but because they tend to elevate the human race and make men better and juster and kinder towards the lower creation.

It is held by a large portion of the Christian Church that inferior animals, as such, have no rights, and that cruelty to animals in itself is not a breach of divine law, however much it may offend the finer feelings of humanity. That, however, is only the view of part and not the whole of Christendom; and it does not affect the question as to whether it may not be for the good of the human race to discourage any cruel and degrading practice. The Vice-Chancellor, in deciding the question as to vivisection made, if I may say so, some very sensible observations which apply to considerations which were pressed upon me, viz. that the objects of a Vegetarian Society are not beneficial, that it cannot be for the benefit of the human race to put a stop to the use of animals for human food. It was said that this case was totally different from cases of religious matters, or education, or relief of the poor; and that it must be decided as a matter of fact, and that therefore it was my duty to hold as matter of fact that a gift to a Vegetarian Society was not beneficial. I have myself no such view as that the use of animal food is in itself wrong, or that it is noxious. The latter question is one, I suppose, depending upon circumstances. The former one is not for me to decide. In *Armstrong* v. *Reeves* (1) the Vice-Chancellor says:—"Now, in the present case, I am of opinion that anything that tends to

(1) 25 L. R. Ir. 325.

prevent the demoralization of public opinion which would be caused by an unauthorized and unnecessary practice of dissection of living animals, would be for the public benefit, as tending to correct and prevent cruelty or carelessness in reference to the suffering of brute beasts. I do not mean to express any opinion—I really do not entertain any opinion—on the question of the total abolition of vivisection; but even if I differed in that respect from the objects of the society, which perhaps I might do as an individual, that is not the question. The question is, whether the object in view is such as may fairly, within the principle of decided cases, be deemed a charitable purpose. The cases I have referred to show that it is. I may also observe that there is a strong tendency in our law, both statute and Common Law, against the practice of cruelty to animals; and if vivisection be, as it must, a cruelty to animals, it can only be justified on the ground of being attended with beneficial public effects, of such importance as to render it desirable that the cruelty should be excused, in view of the public benefits to be derived from such investigations. If the members of this society honestly believe, as I have no doubt they do, that vivisection is a practice involving unnecessary cruelty to animals, I see nothing illegal in their desire to procure its abolition by enactment. I have therefore no difficulty in holding that this legacy of £500 to the Society for the Abolition of Vivisection is a good and valid legacy, whether on the grounds on which I first put it, as not open to objection for uncertainty or perpetuity, or on the ground that it is a charitable gift."

What, then, are the professed objects of these two societies? First, there is the Vegetarian Society established at Manchester, and represented here by Serjeant Dodd. The statement of its objects is as follows:—"The aims of the Vegetarian Society shall be to advocate the total disuse of the flesh of animals (fish, flesh, and fowl) as food, and to promote instead a more extensive use of fruits, pulse, cereals and other products of the vegetable kingdom, and to disseminate information on dietetic reform by means of a magazine or other publication, lectures, essays, letters to the press and other opportunities as they arise bearing upon the many physical, intellectual, moral, social, and other habits resulting from vegetarian habits of diet, and by these means and through

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the example and efforts of its members to extend the adoption of a principle tending essentially to true civilization, to universal humaneness, and to the increase of human happiness generally." That is a somewhat rhetorical description of the objects of the Society containing many adjectives, but the short outcome is that, in the opinion of the persons who agree with the Society and with its objects as here described, it is desirable, not by prevention but by advocacy and by persuasion, to bring conviction to the minds of others and so prevent what the members look on as a needless sacrifice of animal life—needless because according to their idea people could very well live without killing animals—and cruel so far as it is needless. It is not for me to decide whether that idea is right or wrong. But if this be the object of the Society, I cannot distinguish it in principle from that of the anti-vivisectionists, who endeavour to put a stop to the practice of killing or inflicting pain upon animals for the purpose of scientific research. If a number of persons think that it is wrong to kill animals for food, that it is unnecessary cruelty, that the practice produces a demoralizing effect upon mankind, and that it is for the benefit of human beings to inculcate the view that it is unnecessary and cruel, in that sense I think the object is charitable.

The other Society, although its constitution is set out more fully, has not stated its aims at such length as the Manchester Society, but broadly speaking it is exactly the same. The object is to get rid of the practice of killing animals for food, by teaching and by persuasion, the members of the Society considering it inconsistent with the rights of inferior animals and as being needlessly cruel to them, with the result of producing demoralizing effects on the human race; and by so doing it aims at securing the intellectual and moral elevation of men and the physical benefit both of the human race and the inferior animals. In the report of the Society for 1896, under the heading entitled "Suggestions to the Members and Friends of the London Vegetarian Association, and to all those who are interested in the progress of humanity" there is this statement:—"In the following pages will be found hints and information which members of the Association are particularly requested to pass on to their friends, as details connected with one of the most advanced movements of

the day in the direction of social reform, of the amelioration of the lot of all sentient creatures, of the bringing nearer of the time when no man will wilfully take the life of another living being, and when the lower creatures in their turn, not being influenced by the outpouring of the passions and cruelties of man, shall cease to prey upon each other." Whether this last object is likely to be attained I cannot say. The force of example may do much; but it would require a large amount of good example to bring tigers and sharks to live on a purely vegetable diet. But this is only something thrown in. The objects of both societies are identical, the elevation of the human race in a moral as well as in a physical point of view: though undoubtedly they also, and primarily, aim at the benefit of inferior animals. On all these grounds, I am of opinion that the object is a legal one, and also charitable within the principle of decided cases. *In re Nottage* (1) decided that a legacy for the encouragement of yacht racing was not a charity. But even that case was dealt with as a difficult one, and was treated by the Judge who decided it in the first instance as near the border line; and the Court of Appeal also regarded the matter as being one of some substantial difficulty, while deciding that the object was not charitable. This case differs from that *toto cælo*. In *Nottage's Case* (1) the effect of the bequest in the testator's will would be the encouragement of an amusement which might, no doubt, indirectly promote training in nautical matters, and so bring up sailors in our ports and harbours, thus benefiting the community. But that was not the object of the gift. It was to give prizes to the owner of whatever yacht sailed fastest in a particular course. That was the direct object. Here it is intended to develope humane and generous sentiment in man towards inferior animals, not indirectly but directly. I cannot think that the Judges who decided that case would have hesitated about the present one; and I do not feel bound to come to a decision which would frustrate the benevolent intentions of this lady. And so, except to the extent to which the law prevents gifts (being of the nature of an interest in land) from taking effect as charitable bequests—that is as regards the bequest

(1) [1895] 2 Ch. 649.

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of the annuity of £93 in the second codicil, which must be declared void—I hold that the gifts to these two societies are charitable.

R. W. L.

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*Appeal.* April 20–22. May 12.

The defendants, the residuary legatees, appealed to the Court of Appeal (1) against so much of the order of the Master of the Rolls as declared the devise in the will of Mrs. Cranston of the yearly sum of £100, part of the perpetual yearly rent (after the death of Josefa Hollrigal) to the Vegetarian Societies, valid.

*Stanley, Q.C., Samuels, Q.C.*, and *Jefferson*, for the appellants :—

The gift in favour of the Vegetarian Societies is a perpetuity, and therefore bad, unless it is charitable. We contend that it is not so. A gift to be charitable within the statute of Elizabeth must be for a general public use; it must confer a benefit on the public in some way: *Attorney-General* v. *Delaney* (2). That this gift is charitable does not appear from the will at all, and to support the contention of the respondents it becomes necessary to look at the objects of the Society itself in its constitution. We submit that there is nothing in those objects to render a gift to the Society charitable within the meaning of the statute; they are not of a public nature, but more for the benefit of private individuals: *Carne* v. *Long* (3); *Farrer* v. *St. Catharine's College, Cambridge* (4); In *Re Nottage* (5), a gift for support of Yacht Racing; in *Browne* v. *Yeall* (6), a gift for the promotion of virtue, religion, and happiness of mankind; and in *In re M'Duff* (7), a bequest of money for charitable or philanthropic purposes, were held not to be good charitable gifts.

Abolition of vivisection has been decided to be a charitable object: *In re Foveaux* (8), following *Armstrong* v. *Reeves* (9). But

(1) In the Court of Appeal before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.
(2) I. R. 10 C. L. at p. 126.
(3) 2 De G. F. & J. 75.
(4) L. R. 16 Eq. 19.
(5) [1895] 2 Ch. 649.
(6) 10 Ves. 27.
(7) [1896] 2 Ch. 451.
(8) [1895] 2 Ch. 501.
(9) 25 L. R. Ir. 325.

that was on the ground that institutions for the suppression of vivisection had for their purpose the protection of animals against cruelty.

In *The Commissioners of Income Tax* v. *Pemsel* (1) Lord Macnaghten divided all the cases under the statute as charitable into four classes. This gift here certainly does not come under the first three classes, and we say it is not within the fourth. What is a charitable motive does not depend on the view of the individual, nor of the Judge who is to decide the case; but the object or purpose must be one beneficial to the community in the judgment of the general public. There is no idea expressed in favour of general humaneness, and the decisions on charitable gifts for the benefit of animals cannot apply. In *Re Douglass* (2), a gift to the Society for the Protection of Animals liable to Vivisection, and a gift to the Home for Lost Dogs were held good, but it was questioned whether the Society for the Total Suppression of Vivisection was a charity within the same statute. *Armstrong* v. *Reeves* (3) and *In re Foveaux* (4) would show that such gifts are charitable.

*Ronan, Q. C., Gordon, Q. C.,* and *J. H. Moore,* for the respondents:—

To constitute a good charitable gift, it must be for an object not against law, not *contra bonos mores*, and it must be for some charitable purpose in the mind of the donor. The test is whether the testator thought the object was for the benefit of the public, and of a benevolent nature. Whether it is a fad or not, the principle is that the Court cannot judge of the beneficial nature of the object: *Thornton* v. *Howe* (5) is the leading case as to religion. If the gift is such that it must reach the poor as well as the rich, the Court will not question the objects. The following gifts have been held charitable:—*Marsh* v. *Means* (6), a gift to continue a periodical for the protection of animals; *Tatham* v. *Drummond* (7), a gift to

(1) [1891] A. C. 531.
(2) 35 Ch. D. 472.
(3) 25 L. R. Ir. 325.
(4) [1895] 2 Ch. 501.
(5) 31 Beav. 14.
(6) 3 Jur. (N. S.) 790.
(7) 34 L. J. Ch. 1.

*Appeal.* 1898. WEBB v. OLDFIELD.

the Society for the Prevention of Cruelty to Animals; *Nightingale* v. *Goulburn* (1), a bequest to the Chancellor of the Exchequer for the benefit of Great Britain; *Attorney-General* v. *Ward* (2), a gift for the sons of the clergy in London; a bequest for the British Museum, *Trustees of British Museum* v. *White* (3); a bequest for the benefit of a Volunteer Corps, *In re Lord Stratheden and Campbell* (4); a gift for the repair of a church, *Hall's Charity* (5); a gift to the Royal Society and Royal Geographical Society, *Beaumont* v. *Oliveira* (6); right to dredge for oysters, *Goodman* v. *Mayor of Saltash* (7); a gift for deserving but unsuccessful literary persons, *Thompson* v. *Thompson* (8).

The objects mentioned in the statute of Elizabeth are not the only instances of objects which have been held charitable, but the Courts have held gifts to certain other objects to be charitable, acting in analogy to the statute. The charitable gift is not valid, if it can be applied to objects not charitable; but in this will the testatrix has shown from the other charitable legacies that her object was benevolent and philanthropic.

May 12. LORD ASHBOURNE, C.:—

This is an appeal from the Master of the Rolls, and it turns upon the question whether certain gifts in a will can be regarded as charitable under the Irish Statute 10 Charles 1, which is analogous to the English Statute 43 Elizabeth. The gifts are to the officials of the London Vegetarian Society, and the English Vegetarian Society in Manchester. These societies have been formed to induce abstinence from all forms of the flesh of animals, and to encourage instead the use of all kinds of vegetable produce. They hold out not only that their teachings will improve health, but encourage humaneness by tending to diminish the destruction of animal life.

Are these gifts charitable? They are certainly not so in the ordinary meaning of the word—in its popular sense. But the word "charity" under the statute has acquired a wide, elastic,

(1) 5 Hare, 484.
(2) 3 Ves. 327.
(3) 2 Sim. & St. 594.
(4) [1894] 3 Ch. 265.
(5) 14 Beav. 115.
(6) L. R. 4 Ch. 309.
(7) 7 App. Cas. 633.
(8) 1 Coll. 395.

meaning, which has been laid down or developed in numerous cases. Mr. Justice Chitty in the case of *Cross* v. *The London Anti-vivisection Society* (1) has truly said:—"Charity in law is a highly technical term. The method employed by the Court is to consider the enumeration of charities in the statute, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities; and again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all the best that can be done is to consider each case as it arises, upon its own special circumstances. To be a charity there must be some public purpose—something tending to the benefit of the community."

In seeking our analogies it is essential to note that the Irish Statute 10 Charles 1, after mentioning a variety of objects (even including the erection and maintaining of bridges), adds "or for any other like lawful or charitable use or uses warranted by the laws of this realm."

Therefore the question really is—having regard to the authorities, can these gifts to these two vegetarian societies be excluded from the very wide class, deemed to be charitable, according to the broad and gradually widening interpretation of Courts of law?

The gifts here are for rich and for poor, for general public use, not for any particular class or religion. They are for a public purpose—deemed by the testatrix beneficial to the community. Are they charitable within the meaning of the statute and the decided cases? The analogies provided by decided cases are very numerous and very various. Gifts to the British Museum, the Royal Society, for founding a Botanical Society for supporting lectures against cruelty to animals; to the Chancellor of the Exchequer for the benefit of Great Britain, for the repair of sea banks; for the relief of houses of correction; for keeping chimes in repair; for assisting a school for sons of the clergy, and many others, entirely outside the scope of the ordinary popular meaning of the word, have been held to be charitable.

(1) [1895] 2 Ch. 501, 504.

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Mr. Justice Romer in the case of *In re Lord Stratheden and Campbell* (1) was of opinion that a gift for the benefit of a volunteer corps was a charity.

The case of *Thornton* v. *Howe* (2) has naturally been keenly relied on because it decided that gifts to encourage the teachings of Joanna Southcote were charitable.

The case of the *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (3) has been also much discussed before us. It was not suggested there by any of the noble and learned lords that cases coming under the statutes of Elizabeth or Charles should receive a less broad construction than had been theretofore usual: and Lord Macnaghten took the opportunity of laying down with precision that trusts for purposes beneficial to the community, not falling under the other heads of relief of poverty education or religion might equally be held to be charitable.

In *Armstrong* v. *Reeves* (4) the Vice-Chancellor held that gifts to an Antivivisection Society were charitable—a decision not now questioned and followed in England in a case I have already referred to.

The case of *In re Nottage* (5) is interesting as showing that a Court plainly felt some regret and hesitation in deciding that a gift for the sport of yacht racing was not a charity—holding that it was not for a public purpose, but for the amusement of individuals.

The cases to my mind all show a desire on the part of the Court to include every reasonable case in a liberal interpretation of the word charity. Can the gift in the present case be excluded? Here there is nothing private, individual or circumscribed in the gift. It is given freely in the hope that it would be widely availed of by all, earnestly aspiring to be a general public benefit. The advantage of all mankind is the object, the elevation of the world is sought by teaching, which the testatrix believed would improve the general health, and foster a general spirit of humaneness. It may be that this idea of vegetarianism has not as yet made its way in the world. It may be showing no growth.

(1) [1894] 3 Ch. 265.
(2) 31 Beav. 14.
(3) [1891] A. C. 531
(4) 25 L. R. Ir. 325.
(5) [1895] 2 Ch. 649

The vast majority may be opposed to it. It may be disapproved of by medical men. Possibly no member of the Bench may believe in it. But these considerations cannot be regarded as decisive to exclude it from the wide class of gifts regarded by the law as charitable. The gifts are given to societies which rightly or wrongly set a public purpose before them, and which have been founded and maintained in the belief that their teaching is for the benefit of the community. I do not feel at liberty to sit in judgment upon objects or purposes, or to measure the success they now have, or hereafter may attain to. In my opinion the judgment of the Master of the Rolls was right, and this appeal should be dismissed with costs.

FITZ GIBBON, L.J.:—

I concur. We must define the sense in which the law uses the word "charity." In its popular sense, charity involves the idea of *misericordia*, or pity, and of aiding those who are in distress. Though the legal sense includes the popular one, it is far wider, and includes many objects to which the popular idea does not extend. The reason of the extension is material; it is because the legal notion is founded upon the analogy of the statute. When we find that the statute includes a number of objects to which the idea of *misericordia* or pity is wholly foreign, it follows that the idea which the law recognizes as essential to "charity" is something different.

Lord Macnaghten's attempt to divide charitable purposes into four categories fails to satisfy the requirements of a logical division, because, if adequate, it is not distinct. He has defined three classes, but he has put everything else, without any definition, into the fourth class. He has, in fact, divided charitable objects into—I., Relief of the poor; II., Religion; III., Education; IV., Et cetera. Such a division gives no help to determine the question which we have here, viz. whether a particular gift, not for poor-relief, religion, or education, is one which the law recognizes as charitable. The first category rests on the good old popular idea of charity. The second and third rest on the statute, because the advancement of religion and education are expressly mentioned therein. But "analogy" has immensely enlarged their application. For example,

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disseminating the works, and thereby propagating the opinions, of Joanna Southcote, has been held charitable, and under the heads of "religion" and "education," cases of gifts to further the tenets, or to advance the teaching, of very small and very peculiar classes in the community, have been established as charitable, even though, if at all beneficial, they were restricted to a very few, and even though the "benefits" conferred on these few were opposed in the strongest manner to the creeds, or to the judgments, or to the prejudices, of the vast majority, and were even regarded as heretical, or even mischievous, by that majority. The essential attributes of a legal charity are, in my opinion, that it shall be *unselfish—i.e.* for the benefit of other persons than the donor—that it shall be *public, i.e.* that those to be benefited shall form a class worthy, in numbers or importance, of consideration as a public object of generosity, and that it shall be *philanthropic* or *benevolent—i.e.* dictated by a desire to do good. We must remember, in cases of the fourth category, that these conditions have been held to be satisfied, in cases of the second and third, by gifts for the benefit of very small sects and sections. Under those circumstances, being bound to clear our minds of the idea of *misericordia*, I can not reconcile the cases by anything short of adopting the principle that any gift which proceeds from a philanthropic or benevolent motive, and which is intended to benefit an appreciably important class of our fellow-creatures (including, under decided cases, animals), and which will confer the supposed benefit without contravening law or morals, will be "charitable." Chitty, L.J., rightly points out that benevolence or philanthropy alone will not suffice, because there charity, like faith, is dead, being "without works," and there are plenty of philanthropic and benevolent people who stop at words, or at ideas, and to be "charitable" they must *do* something or *give* something for the benefit of others.

Having got thus far—What is the tribunal which is to decide whether the object is a beneficent one? It cannot be the individual mind of a Judge, for he may disagree, *toto cælo*, from the testator as to what is or is not beneficial. On the other hand, it cannot be the *vox populi*, for charities have been upheld for the benefit of insignificant sects, and of peculiar people. It occurs to me that the answer must be—that the benefit must be one which

*the founder* believes to be of public advantage, and his belief must be at least rational, and not contrary either to the general law of the land, or to the principles of morality. A gift of such a character, dictated by benevolence, believed to be beneficent, devoted to an appreciably important object, and neither *contra bonos mores* nor *contra legem*, will, in my opinion, be charitable in the eye of the law, as settled by decisions which bind us. It is not for us to say that these have gone too far.

Addressing myself to the question of fact in the present case—whether we call it a fad or not, "Vegetarianism" is a fact. In various forms it has existed from ancient times; it has been the practice, and it is the creed of many, including the most numerous sect under the Queen's sway. The Vegetarian Society has existed for half a century, and its adherents are numerous and widespread. Its principles appeal to humanity, and tend to mercy and to morality, whether they are practical or visionary. Comfort and economy would be promoted by a vegetable diet, even though it might be in some respects injurious. It is hard to see why the promotion of total abstinence from flesh should not be a "charitable" object in the legal sense, if we are at liberty to recognize the promotion of total abstinence from intoxicants as charitable; moderation and temperance may be carried to excess, and though the benefits and the drawbacks may differ in degree, they seem to be the same in kind. The motives of the promoters of teetotalism and of vegetarianism are equally unselfish, and equally benevolent, and the efforts of vegetarians, so far as I can form a judgment, seem less likely to do mischief than those of the anti-vivisectionists, or even than those of the promulgators of the works of Joanna Southcote.

For the reasons which I have summarized, I think that the case falls within the decisions which have established gifts to be charitable.

WALKER, L.J.:—

The gifts in this will which have been challenged are, "to the trustees, treasurer, or other proper officers from time to time of the London Vegetarian Society and the English Vegetarian Society established in Manchester, in 1847." There is another legacy to

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"The London Society for the total abolition of vivisection" which the residuary legatees do not question.

As the will contains no description of the character or objects of the Vegetarian Societies we have to look to their constitution as defined by their charters. I think they may be described as voluntary associations of individuals and affiliated Societies for the promotion of Vegetarianism, defined as abstinence from the flesh of animals, fish, flesh, and fowl, as food, and the encouragement of the use of seeds, pulses, grains, fruits, nuts, and other wholesome products of the vegetable kingdom. In another place Vegetarianism is described as "the total abstinence from food which has been procured through the destruction of life," which is pronounced to be contrary to humanity. Various methods are pointed out by which the objects may be and have been aided, and results indicated alleged to be useful to the cause of humanity, and instruction of the poorer classes, but the objects are what I have stated. The question which we have to consider is whether the gifts are "charitable" in the legal sense which that word has acquired by reason of the wide language used in the statute of 43 Elizabeth and the analogous statute in Ireland of 10 Car. 1. This latter statute after dealing with the subjects of education, relief of the poor, and religious purposes, proceeds, "or for the erection, building, maintenance, or repaire of any bridges, causeyes cashes, paces, and highways within this realme or for any other like lawfull and charitable use and uses, warranted by the laws of this realme now established and in force." As early as 1767 the Lord Chancellor gave a definition of charity under the statute as "a gift to a general public use which extends to the poor as well as the rich": *Jones* v. *Williams* (1).

It has long been settled that for the purpose raised by the present case, the test is not whether the gift is "charitable" within its ordinary and popular sense, but within its technical, acquired, and legal sense. The difficulty in *Commissioners of Income Tax* v. *Pemsel* (2), was in determining which sense it would bear. Lord Cairns, in *Dolan* v. *M'Dermot* (3), says: "There is perhaps not one person in a thousand who knows what is the

(1) 2 Ambl. 652. (2) [1891] A. C. 531. (3) L. R. 3 Ch. 678.

technical and legal meaning of the word 'charity.'" Lord Halsbury in *Pemsel's Case* (1), after referring to numerous cases on the statute of Elizabeth says:—"In these and many like cases it appears to me that the distinction between what is charitable in any reasonable sense, and that to which trustees for any lawful and public purpose may be compelled to apply funds committed to their care has been—I will not say confused—but so mixed that where it becomes necessary to define what is in its ordinary and natural sense 'charitable,' what is merely public or useful, is lost sight of." Lord Macnaghten, at p. 583, after giving his division of charitable objects in the legal sense, winding up with as a fourth division, "trusts for other purposes beneficial to the community not falling under any of the preceding heads," says, that a person of education would exclude from endowed charities the fourth division. In the same case in the Court of Appeal, at p. 307 of 22 Q. B. Div., Lord Esher says:—"If you give to the word the larger sense given to similar words in the Court of Chancery, it would include almost anything given for a public purpose, and would include many things which would be beyond the interpretation of the words among ordinary educated people, such as a grant of money to supply waterworks to such towns as Manchester or Liverpool."

A striking illustration of the same doctrine is to be found in the case of *Goodman* v. *Mayor of Saltash* (2). There it was held that a condition that the free inhabitants of ancient tenements in the borough of Saltash should have a right of dredging for oysters in the estuary, could be sustained as a charitable gift, Lord Cairns saying, "Such a condition would create that which, in the very wide language of our Courts, is called a charitable, that is to say, a public trust or interest."

In order to bring any gift within this description the giver must contemplate a public benefit, and not some other immediate purpose from which public benefits may indirectly, and in result follow. It was this consideration which defeated the gift in *Re Nottage* (3), where it was held that the immediate object was to encourage the sport of yacht racing. It is that to which

(1) [1891] App. Cas. 531, at p. 544.
(2) 7 App. Cas. 633.
(3) [1895] 2 Ch. 649.

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Rigby, L.J., refers, when he says, "We must always go back to the analogy of the statute, which furnishes the only test that can be applied to see whether a gift is charitable or not. If the present gift is to be supported as charitable, it must be on the ground that it is for a general public purpose. It is, however, plain from the words of the testator himself that he was not contemplating any such purpose—his object in founding the prize is to encourage the sport of yacht racing."

In the present case I think the object must be attributed to the testatrix of intending to benefit all mankind by helping to spread the doctrines of vegetarianism. Most people will consider that such benefit would not be in fact advanced, but the gift is not illegal or contrary to public policy or opposed to the settled principles of morality. It involves a question of opinion upon which the majority of people will differ from the giver.

There may be cases in which the Court would feel itself at liberty to set up its own view against that of the giver, even though the purpose offended against none of the doctrines I have mentioned. I do not think it can in such a gift as the present. We know from our general reading that there are a large class who believe as the testatrix did, and that there are societies for the spread of vegetarianism in England and other countries.

Take some of the specific objects mentioned in the statute of Elizabeth religion and education. On those subjects which so vitally concern the interests of mankind, the Court, subject to the limitations I have mentioned, does not set up its own opinion: *Thornton* v. *Howe* (1), is an instance as regards religion, and *Farrer* v. *St. Catharine's College* (2), as regards education. It was on this point I referred during the argument to the observations of Lord Selborne, in L. R. 16 Eq. 24:—"One cannot help thinking it is a strong example of the inconvenience of the state of the law which forces upon the public gifts of very doubtful public utility. However, such is the state of the law."

Lord Herschell, in *Pemsel's Case* (3), refers to the same subject, and seems to consider that it makes no difference that opinion should differ widely as to the expediency or utility of the object.

(1) 31 Beav. 14. (2) L. R. 16 Eq. 24. (3) [1891] App. Cas. p. 573.

It seems to me these considerations ought to apply much more strongly when we are dealing with the head of what is, or may be, or is supposed by the giver to be, useful for mankind, especially when we are considering the debateable question of what is healthy for the human race, or what is cruel. We know that some of the most valuable discoveries in medical science were for a long time disbelieved in and ridiculed. Again, most people will admit that vivisection should be allowed when it is practised, in the words of the Act of 1876, "for the advancement by new discovery of knowledge which will be useful for saving or prolonging life or alleviating suffering," but a number of persons honestly believe the contrary, and gifts for the total abolition of vivisection have been supported as charitable. I think the principle of those decisions applies to the present.

The principle is summed up in the concluding words of Lord Justice Chitty in *Re Foveaux* (1). "It may be truly said that the infliction of justifiable pain is not cruelty. The question of what is and what is not justifiable is a question of morals, on which men's minds may reasonably differ and do in fact differ. The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community; whether if they achieved their object, the community would in fact be benefited, is a question on which I think the Court is not required to express an opinion."

The object of vegetarians is to induce mankind to live on vegetables—a more wholesome and cheaper diet than animal flesh, and induce them to abstain from killing animals, which if man does not need them for food, is cruel because needless, and demoralizing because cruel.

The idea may be erroneous and may be visionary, but it was entertained honestly by the giver, and her gift was designed for the benefit of mankind, and I think it is charitable according to the legal sense of that term.

(1) [1895] 2 Ch. 501.

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HOLMES, L. J.:—

The question involved in this case is of first impression; and I have found little to assist in its solution in reported decisions.

The term "charitable," as applied to donations and trusts, has received in our law an artificial meaning, which does not lend itself readily to definition or classification. The legal conception of the term is to be traced to the enumeration in the preamble of the statute 43 Elizabeth, c. 4, of a list of charities of a very varied and heterogeneous character. Where the object of a gift clearly comes within one of the classes therein specified, it is held to be charitable, however difficult it may be to reconcile such a conclusion with popular ideas; and the result, although often surprising to a layman, is arrived at without difficulty by a lawyer. But, unfortunately for the latter, this list, comprehensive as it is, does not exhaust the objects of legal charity. It only supplies instances, and where a purpose can be brought by analogy within the spirit and intendment of the statute it is also held to be charitable. It is these analogous cases that cause perplexity. It is difficult to reconcile them with each other or to extract from them any guiding principle. Lord Macnaghten in his judgment in *The Commissioners of Income Tax* v. *Pemsel* (1) says:—"Charity in its legal sense comprises four principal divisions—Trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." I don't know a better classification, and yet it is obvious that the fourth head is altogether vague and indeterminate. If the gentleman of education without legal training, to whom Lord Macnaghten afterwards refers, were asked whether a legacy for the promotion of vegetarianism is a charitable gift, I doubt if his reply would be "You had better ask a lawyer." He would think that there could only be one answer; and yet, he would be wrong, for if he were to put the question to two lawyers, he would almost certainly receive two different opinions. At all events there are two opinions on the subject in this Court; and there are few cases in which judicial disagreement would be less surprising.

(1) [1891] A. C. 531.

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The part of Mrs. Cranston's will, which relates to the matter to be decided, has been already read. It is a devise of the yearly sum of £100, portion of a larger perpetual annual rent to the trustees, treasurer, or other proper officer from time to time of the London Vegetarian Society and the English Vegetarian Society, established in Manchester in 1847, to be paid to them for ever, by equal half-yearly payments in equal moieties, for the use of the said respective societies. There is nothing in the will to indicate that the testatrix considered that the institutions that she intended to benefit were of a charitable nature ; but it may be assumed that she would not have made them the objects of her bounty if she did not believe that they would apply her gift to a benevolent and useful purpose.

The aims of the two societies, as set forth in the constitution of the one and in the rules of the other, are practically identical. They are the advocacy of abstinence from the flesh of animals as human food and the promotion amongst mankind of a purely vegetable diet. In considering whether these associations are charities, we ought, I think, to look rather to their objects than to the means by which those objects are sought to be attained. The persons who control them for the time being are given a large discretion in selecting the modes of working. Some of the means employed can hardly be considered charitable, even in the most extended application of that word, such, for example, as the promotion of fraternal intercourse between London vegetarians, whether as individuals or as members of societies, and dinners given to the Press of London. On the other hand, the lectures in Board Schools might be regarded as tending to the advancement of education, and, therefore, charitable. It is a rule of law that a fund which, at the discretion of trustees, may be applied for charitable or other purposes is not a legal charity ; but where means varying in character all tend to the same charitable end, the undertaking does not cease to be charitable by reason of the fact that some of its methods, if looked at separately, could not be so regarded.

I have occasionally met with persons who from taste or convenience abstained either temporarily or permanently from animal food ; but I have only known one vegetarian on principle. I

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assume, however, that strict and conscientious vegetarians are more numerous than my own experience would have led me to believe. I gather, moreover, from the report of the London Society, as well as from the references to the subject to be found in current literature, that the foundation of vegetarianism, in the opinion of its promoters, is moral rather than material. The slaughter of animals to provide food for man is considered cruelty; and it is argued that the exercise by him for merely selfish purposes of that dominion which he possesses over the lower creatures tends to blunt his feelings of mercy and humanity, to make him callous to pain and suffering, and generally to degrade his higher nature. I have no doubt that vegetarians at the same time believe that the change of diet which they advocate would improve the general health, introduce a more economical mode of living, and in other ways increase the sum of human comfort.

There is nothing illegal or contrary to public policy in the propagation of these doctrines; and it is not to be supposed that in dissenting from the conclusion of my colleagues I am of opinion that the law regards vegetarian societies with hostility or jealousy. Money may be given or bequeathed to add to their resources or to further their objects without stint or limit. Had Mrs. Cranston desired to increase their funds by a testamentary gift, a lawyer could have suggested to her various ways of effecting her object that could not have been questioned. It happens that the mode she selected creates a perpetuity, with the consequence that the gift fails if the object be not charitable. Hence the necessity for considering the question to which I am now about to apply myself very briefly.

It is, I think, clear that a gift of this kind is not included in the instances of charities contained in the statute of Elizabeth. It is equally clear that it cannot be brought within any of the first three classes enumerated by Lord Macnaghten. It is not given for the relief of poverty, for the promotion of education, or for the advancement of religion. There remains the fourth class. Is it a gift for other purposes beneficial to the community not falling under any of the preceding heads?

The object must be one by which the public, or a section of the public, benefits. So much is admitted; but what is the test or

standard by which a particular gift is to be tried with a view of ascertaining whether it is beneficial in this sense? I am of opinion that it does not depend upon the view entertained by any individual—either by the Judge who is to decide the question, or by the person who makes the gift.

There is probably no purpose that all men would agree is beneficial to the community; but there are surely many purposes which everyone would admit are generally so regarded, although individuals differ as to their expediency or utility. The test or standard is, I believe, to be found in this common understanding. The first three heads of Lord Macnaghten's classification are based on it. There is the widest difference of opinion as to the best way to relieve the poor, as to religious dogma, as to the subjects and methods of education; but there is a general concurrence that the lot of the needy ought to be ameliorated in some way, that man should be under the guidance of some religion, and that he should receive some kind of intellectual training. Moreover the idea is widely entertained that a religious or educational system, which, when compared with other systems, would be considered by most men to be defective or objectionable, may have a powerful influence for good on those who accept it, and in any case is to be preferred to atheism or ignorance. In my judgment Lord Macnaghten's fourth class rests on the same foundation of a common understanding. I do not intend to go through the authorities that have been cited during the argument, or others that I have looked at since. It is enough to say that I can find in them nothing inconsistent with my proposition, and that when they are taken as a whole they completely bear it out. The cases which were most strongly relied on for the respondents, and which seem at first sight to extend most widely the legal conception of a charity, will be found on examination to come either within the terms of the statute of Elizabeth such as *Nightingale* v. *Goulbourn* (1), or within one of Lord Macnaghten's first three classes, such as *Thornton* v. *Howe* (2), the *Attorney-General* v. *Lawes* (3), and *Farrar* v. *St. Catharine's College* (4). We were

(1) 5 Hare, 484; 2 Ph. 594.
(2) 31 Beav. 14.
(3) 8 Hare, 32.
(4) L. R. 16 Eq. 24.

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strongly pressed with *Thompson* v. *Thompson* (1); and I admit that if the charitable object in that case was to extend the knowledge of those doctrines in the various branches of literature to which the testator had turned his attention and pen, it would be difficult to reconcile it with my view; but the report is an indifferent one, and there is every reason to believe that the true ground of the decision was that the legacy was given for the purpose of providing a pension for a poor and unsuccessful man of letters.

Let me now apply the standard I have suggested to Mrs. Cranston's bounty. From the earliest period of which we have any record, and in every part of the world—especially in the most refined and civilized countries—a substantial portion of man's diet has consisted of animal food, to supply which it has been customary to kill certain kinds of beasts, birds, and fish. By no code of morality is this practice condemned as immoral. By no school of medicine is it deemed unwholesome. In no scheme of domestic economy is it regarded as extravagant. There have been, probably, always a few who have protested against it on conscientious grounds; and latterly several societies have been formed to carry on what is called, in one of their reports, a crusade against this practically universal habit. It is possible they may succeed. Missionaries as few, and apparently as feeble have, from time to time, altered the current of human thought and action; although I doubt whether any change hitherto made in the world was quite so unlikely as what these societies propose. At the present time, however, the enterprise has no kind of countenance from public opinion. Beyond a few eccentrics, no one thinks of connecting it with public utility, or with the moral or material improvement of mankind. We cannot regard it as we might regard an obscure and novel religious sect, as a doubtful branch of a great beneficial and elevating movement. In its most favourable aspect it is a harmless attempt to substitute one kind of food for another. Its promoters, no doubt, believe in its utility. The social missionary thinks that there is no message so useful as his own, although, like Lord Bramwell, I believe in all cases of propagandism there is mixed up a wish for the prevalence of

(1) 1 Collier, 381.

the opinions entertained by the propagandist, simply because they are his own. But can this belief make a project of this kind a charity in any sense which the law attaches to that term? If it can, it seems to me that every project not actually immoral or illegal must be held a charity. Schemes to promote what is called a rational dress for women, or a more aesthetic costume for men, to substitute canvas tents for the present kind of habitation, to limit our food to a single meal a-day, to make night the time for labour, and day the time for sleep and rest, would each be deemed beneficent agencies by a few human "cranks," but it will require a new definition of legal charities to bring them within that category.

I find that the instructive judgment of the Master of the Rolls in this case mainly rests on the decisions relating to animals. *The University of London* v. *Yarrow* (1), *Marsh* v. *Means* (2), and *Tatham* v. *Drummond* (3) established the proposition that gifts the object of which is to prevent cruelty to animals and to ameliorate the position of the brute creation are charitable. No metaphysical reasoning is required to support these decisions. The Divine Teacher from whom Christendom has learned its lessons of charity and mercy treated the healing of the sick and the relief of a suffering ox or ass as cognate acts, differing, no doubt, in degree, but the same in kind. There is really no difference amongst thoughtful and civilized men on this subject. If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty.

After the cases I have mentioned came the vivisection cases which, in my opinion, are governed by precisely the same principle. Vivisection is a practice confined to a small body of scientific men. It is, or was, before the Act of 1876, undoubtedly attended with great and often excruciating pain to a living animal; and although this may be justified by the object aimed at, it readily degenerates into wanton cruelty when employed recklessly or for the purpose of mere experiment. So strong was public feeling on the subject

(1) 1 De G. & J. 72. (2) 3 Jur. (N. S.) 790. (3) 4 De G. J. & Sm. 484.

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that more than twenty years ago a statute was passed subjecting the practice to rigid restriction and supervision, and even in its present modified condition, it stands on the border line of cruelty; and there is a great body of well-informed opinion, holding that it would be for the true interests of mankind to put an end to it altogether. I think that there is no analogy between a practice such as this pursued by only a few individuals, attended with the severest suffering, and productive of very doubtful benefit, and the universal habit of killing animals for human food in a manner that causes at the most but momentary pain. There are practices to which animals are subjected for the purpose of preparing them for the table which closely approach—it may be, overstep—the border line of cruelty, just as there may be cruelty in some of the modes in which horses are trained, prepared, and harnessed, with a view to their being driven or ridden. But by no standard now recognized in the world is the mere slaughter of an animal for the purpose of cookery held to be more cruel than using the horse as a beast of burden. It would be easy to amplify by further comment and illustration my reasons for differing from the judgment of the Court; but I have said enough to indicate my opinion, and as it cannot affect future decisions it would be unprofitable for me to occupy further time.

Solicitors for the appellants: *Bennett Thompson & M'Laughlin.*
Solicitor for the respondents: *J. C. White.*

R. D. M.

## M'ILROY *v.* TRAILL.

(1896. No. 964.)

*V.-C.* 1898. April 18.

*Specific performance—Lease—Ante-dating—Injunction against pleading execution as of other date.*

A judgment for the specific performance of an agreement for a lease directed the lease to be ante-dated :—

*Held*, that the judgment should also restrain the parties, in any action on the lease, from averring that same was of any other date.

Existing Irish practice adhered to.

THIS case was placed in the list to be spoken to on the minutes of the judgment, on an application by the defendant that the draft thereof should be altered by inserting a provision in the nature of an injunction which he claimed to be necessary for carrying out the decision of the Court.

The action was brought for specific performance of a verbal agreement made on the 1st May, 1896, by which the defendant agreed to take from the plaintiff a lease for a term of years from that date of certain houses then in course of erection, the plaintiff's property, and which under the agreement the plaintiff was to complete.

The defendant alleged that the plaintiff agreed to make the houses habitable, that this was a condition precedent to the execution of the lease, and that the plaintiff had not performed the condition; and defendant counterclaimed for damages.

On the trial of the action the Vice-Chancellor found that the completion by the plaintiff of the houses and making them habitable was not a condition precedent to the execution of the lease, but that this was a matter to be provided for by that document, and he pronounced judgment directing specific performance, the lease to be dated as of the 1st May, 1896, and on the defendant's application permitting him to withdraw his counterclaim.

The curial part of the judgment, dated 14th January, 1898, as drafted, was as follows :—

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This Court doth declare that the plaintiff is entitled to have the verbal agreement for a lease in the third paragraph of the statement of claim in this action set forth specifically performed and carried into execution, and doth order and adjudge the same accordingly; and it is ordered that the several parties hereto do execute a lease in the terms of the verbal agreement as set forth in said third paragraph, said lease to bear date as of the 1st day of May, 1896, and to contain in addition to the ordinary covenants in such leases usual a covenant by the plaintiff to complete the premises thereby leased to the defendant in a substantial and workmanlike manner* the draft of such lease to be settled at Chambers in case the parties differ, and the several parties applying by their counsel so to do, the Court doth permit the defendant to withdraw his counterclaim delivered with his defence in this action, and the plaintiff to withdraw his reply thereto. . . . . .

The defendant sought to have inserted at * in the judgment the words:—

"And let the plaintiff and defendant in any action on such lease be restrained from averring that same is of any other date."

*Matheson*, Q.C., and *William Moore*, for the defendant in support of the application:—

The object of ante-dating the lease is to leave the parties free to resort to their concurrent rights at law on the covenants in the lease in case there has been a breach by anticipation. The form of order usual in England recites an undertaking not to aver in any action on the covenants that the lease was executed on any day other than that of its date: *Pain* v. *Coombs* (1). In Ireland it seems to be the practice to grant an ancillary injunction. This was done in *Browne* v. *Marquis of Sligo* (2), where the form of the decree is given (p. 13) containing the words sought to be inserted here. See also *Cartan* v. *Bury* (3). [Counsel also referred to Fry, Specific Performance (3rd Ed.), 446, and cases there cited.]

*Gordon*, Q.C., and *F. N. Greer*, for the plaintiff:—

The alteration should not be made: it was not part of the judgment pronounced. In *Bankart* v. *Tennant* (4) Sir W. M. James, V.-C. (p. 150), objects to the ante-dating of documents.

(1) 1 De G. & J. 34.
(2) 10 Ir. Ch. R. 1.
(3) 10 Ir. Ch. R. 387, 399.
(4) L. R. 10 Eq. 141.

Moreover, the direction in the judgment that the lease is to be ante-dated gives the defendant all that is necessary for his protection. [They also referred to Fry, Specific Performance (3rd Ed.), 446, 7.]

The Vice-Chancellor :—

In the notes of my judgment I find a direction that the lease shall be ante-dated. I am of opinion that the defendant is entitled to have the words he seeks to add inserted in the judgment. They declare no new right, and throw no new liability on either of the parties, and are merely ancillary to working out the judgment. Were it not for their introduction, it might be open to the plaintiff to attempt to defeat my judgment directing the lease to be ante-dated, by setting up in some other proceeding a different date. If the practice of ante-dating has, as Mr. Gordon says, been disapproved of, it is not for me to alter it; and I find that in such cases it includes such an injunction as here asked for. I shall follow the existing practice unless and until it is changed by the Court of Appeal. I therefore grant this motion with costs.

Solicitors for the plaintiff: *Greer & Hamilton.*
Solicitors for the defendant: *Crookshank, Leech, & Davies.*

D. M'C. M.

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**ABSOLUTE GIFT**—*Will—Construction—Subsequent gift over of "any balance remaining" after death of legatee.*] A testatrix bequeathed one-third of the residue of a sum of £6000 Consols to *A. L.*, one-third to *E. T.*, in trust for *E. W.*, and one-third to *E. T.*, in trust for *M. W.*, and directed that any balance remaining in the hands of *E. T.* after the death of *E. W.* should go absolutely to *E. T.*, and that any balance remaining in the hands of *E. T.*, after the death of *M. W.*, should be equally divided between the children of *A. L.* who should then be living:—*Held*, that the legacies to *E. W.* and *M. W.* were absolute gifts, and that the direction as to the balance was inoperative. *Constable* v. *Bull* (3 De G. & Sm. 411) discussed. *In re Walker, deceased; Lloyd* v. *Tweedy* - M. R. 5

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**ACTION TO RECOVER POSSESSION OF LAND**—*Jurisdiction—Divisional Court—Chancery or Queen's Bench Division—Equitable claim—Judicature (Ireland) Act, 1877, sects. 36, 37, 38.*] The plaintiff brought in the Chancery Division an action, claiming an account of what was due by the defendants to him for use and occupation of a certain agricultural holding, or, in the alternative, that the mesne rates payable by the defendants for wrongfully withholding the premises from the plaintiff might be ascertained and ordered to be paid by the defendants to the plaintiff; and to have it declared that the plaintiff was entitled to possession of the said holding, free from any claim or tenancy of the defendants, or alternatively, that the plaintiff was entitled to receive the rents of the holding from the defendants as "future tenants" within the meaning of the Land Law (Ireland) Acts. By his defence one defendant repudiated any tenancy or interest in the holding, and denied that he had ever claimed any such tenancy or interest. The other defendant, by his defence, claimed to be in possession of the holding, under an agreement with the plaintiff, whereby the plaintiff let to him the grazing of the lands for a fixed sum down to the 1st of May, 1887, and whereby the plaintiff agreed to let the said lands to him as tenant from year to year, from the 1st of May, 1887, at a yearly rent to be fixed by agreement between the plaintiff and the said defendant, and that the said defendant was always ready and willing to carry out this agreement, on the faith of which he entered into and remained in possession of the lands, but that the plaintiff had failed to carry out his part of the said agreement and had refused to recognize any right of tenancy in the said defendant. Neither party made any application to have the action transferred to a Common Law Division. On the action coming on for trial, both parties being in attendance with their witnesses, the Vice-Chancellor dismissed the action without prejudice to any proceedings the plaintiff might be advised to take for recovery of the possession by ejectment, or for rents or mesne rates, or for use or occupation of the lands:—*Held*, by the Court of Appeal, that there was no jurisdiction to dismiss the action, and that the case should be remitted to the Vice-Chancellor to proceed therein as to justice might appertain, either by hearing the case himself, or by transferring it to a Common Law Division, with power to take the latter step either on the application of one of the parties or on his own motion. *Clanricarde* v. *Ryder*
[V.-C. 98; APP. 104

**ADMINISTRATION ACTION**—*Costs—Creditor's suit—No assets.*] It is a general rule, as held in *Bluett* v. *Jessop* (Jac. 240), that where a creditor proceeds against a personal representative for the administration of the personal estate, and the result shows that there was no personal estate at the time of the commencement of the suit, and therefore nothing to pay the costs of the personal representative, and that the personal representative is not in any default, the plaintiff must indemnify the personal representative in respect of the costs of the proceedings. In an action by creditors for administration it turned out that, owing principally to the fact that pending the action another Court

**ADMINISTRATION ACTION**—*continued.*
decided that the testator's interest in certain lands (returned by the executrix as assets) did not continue after his death, there were no available assets, and there was a considerable balance due to the executrix, although, if the defendant's schedule of assets for probate purposes had been correct, there would have been sufficient to pay a substantial dividend to the creditors:—*Held*, that the plaintiffs should pay the costs of the action. *Hibernian Bank* v. *Lauder* - - - - - - V.-C. 262

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**ANNUITY**—*Separation deed—Bequest by will—Satisfaction.*] By a separation deed *S.* covenanted that he, his executors, and administrators, would pay to his wife an annuity during the term of her natural life of the weekly sum of 15*s.* By his will *S.* bequeathed to his wife a weekly sum of 12*s.*, and the life use of a house and furniture:—*Held* (1), that the annuity under the deed was payable to the wife for her life, and not merely during the joint lives of the husband and wife, and (2), that the legacy of 12*s.* could not operate as a satisfaction of the testator's liability under the separation deed of greater amount, and that the bequest of the life use of house and furniture could not be treated as a satisfaction, not being a gift of the same nature as the debt. *Coates* v. *Coates* - V.-C. 258

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**ANNUITY OUT OF CORPUS**—*Deed — Construction.*] By marriage settlement the intended husband granted lands to trustees, upon trust to permit him to receive the rents and profits for life, without impeachment of waste, and after his death to permit the intended wife to receive £300 a-year "out of the rents, issues, and profits thereof, for and during her life, without impeachment of waste, and for her jointure," and in lieu of dower, and "immediately after her decease" in trust for the settlor, his heirs and assigns. The settlor covenanted that the lands or any property to be taken in exchange thereof under a power of exchange therein contained should, during the life of the wife, produce the clear yearly sum of £300. In case of there being issue of the marriage living at the death of the settlor all his estate and property at the time of his death was charged with a sum of £3500 for such issue. *Held*, by Ross, J., that the

**ANNUITY OUT OF CORPUS**—*continued.*
annuity was a charge only upon the rents and profits accruing during the annuitant's life. *Held*, by the Court of Appeal, reversing the judgment of Ross, J., that the annuity was a charge upon the *corpus* of the settled property. *In re West's Estate* [Ross, J., 75; APP. 83

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**BUILDING LEASE**—*Covenants usual and proper in—Fee-farm grant — Landlord and Tenant Amendment Act (Ireland)*, 1860 (23 & 24 *Vict. c.* 154), *ss.* 41 *and* 42.] The defendants advertised for tenders for fee-farm grants of building lots in the vicinity of the city of *L.*, subject to conditions, amongst others (*a*) that the lessor's title should not be investigated, and (*b*) that the fee-farm grant should contain all covenants usual and proper in building leases. The draft conveyance furnished by the defendants to the plaintiff, whose tender for some of the lots had been accepted, contained only a qualified covenant for title, to which the plaintiff objected:—*Held* (affirming the decision of Porter, M. R.), that, in the absence of evidence to show what were usual and proper covenants in building leases, the plaintiff was entitled to the statutable covenants contained in sect. 41 of the Landlord and Tenant Amendment Act (Ireland), 1860. *Colhoun* v. *Trustees of Foyle College* - - APP. 233

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**CHARITY**—*Bequest to Christian Brethren—Religious objects—Charitable organization.*] Bequest of "one hundred pounds sterling to the Christian Brethren, in trust of *A. B.* and *C. D.* one year after my death." *Held*, a valid charitable gift. *In re Brown, deceased; Paden* v. *Finlay* - M. R. 423

**2.** —— *Devise—Perpetuity—Gift to Vegetarian Society.*] By her will a testatrix (after giving a life estate therein) devised portion of a perpetual yearly rent, issuing out of certain hereditaments and premises, to the trustee, treasurer, or other proper officer from time to time of the *L.* and *M.* Vegetarian Societies, in equal moieties, for the use of the said respective Societies, to be paid to them for ever. The Vegetarian Societies advocated the disuse of animal food and the use of fruits and vegetables for sustenance of life. Their objects were to put a stop to the slaughter of living creatures for food, which practice they thought was inconsistent with the rights of animals, was needlessly cruel to them, and had the result of producing demoralizing effects upon men. By advocacy of these principles the adherents of the Societies, according to their rules, aimed at securing the intellectual and moral improvement of men, as well as the physical benefit of men and inferior animals:—*Held*, by the Master of the Rolls, that the object of the Societies might be fairly described as charitable within the principle of decided cases, and that there was a valid gift to the two Societies in equal moieties. Decision of Porter, M. R., affirmed by the Court of Appeal; Holmes, L.J., *dissentiente*. *In re Cranston deceased; Webb* v. *Oldfield*
[M. R. 431; APP. 440

**3.** —— *Discretion of trustees—New trustees appointed by Court—Control of Court over fund—Jurisdiction to settle scheme—Payment out of Court.*] *C.* by will left all the residue of his property to the Right Rev. Dr. F., or the person for the time being Roman Catholic Bishop of Ferns, the Rev. T. S., Parish Priest of *C.*, or the person for the time being Parish Priest of *C.*, the Rev. M. W. and N. H., upon trust for his daughter for life, and after her death to apply the trust estates for such charitable objects and purposes as his said trustees or trustee should in their or his absolute discretion think proper. The testator gave to his trustees powers of investment and of appointing new trustees, with a declaration that the latter power should be vested in the trustees or trustee for the time being, or in the executors or administrators of the last deceased trustee, subject to this direction, that so far as practicable the Roman Catholic Bishop of *F.* and the Parish Priest of *C.* should at all times be trustees of his will, if willing to accept such office. The testator appointed his trustees executors. He died in 1870, and the present action to administer his real and personal estate was commenced by the trustees in 1870. The testator's daughter died in 1897. All the trustees named in the will were then dead, and by orders of the Court the Roman Catholic Bishop of Ferns, the Parish Priest of *C.*, and two other Roman Catholic clergymen were appointed new trustees of the will. They applied for payment to them of funds brought in to the credit of the action representing the testator's estate, and the application was supported by an affidavit stating the purposes to which they intended to apply the money, namely, for the support of Roman Catholic charitable objects in the diocese of *F.* and in the parish of *C.*, where the testator lived. The Court being of opinion that, upon the construction of the testator's will, the original trustees had an absolute discretion as to the charitable objects and purposes to which the property was to be applied, and that a similar discretionary power was vested in the new trustees; *held*, that while the Court possessed in such cases jurisdiction to settle a scheme, it would not in a case like the present, where intervention was unnecessary for the protection of the property interfere with the discretionary power of the trustees, and that accordingly the funds should be paid to them. The decision of the Vice-Chancellor affirmed. *Warren* v. *Clancy* - - APP. 127

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**COMPULSORY PURCHASE**—*Labourers Act*, 1896 (59 & 60 *Vict. c.* 53), *sect.* 3—*Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *second schedule—Lands Clauses Act*, 1845, *sect.* 72—*Railways (Ir.) Act*, 1851, *sect.* 17—*Sums not exceeding £20—Land acquired by tenant under Land Purchase Acts—Annuity payable to Irish Land Commission—Receipt.*] The Guardians of a Poor Law Union, being the sanitary authority for the district, required a small plot of ground for the erection of a labourer's cottage. The piece of ground was part of a holding purchased under the Land Purchase Acts, and subject to an annuity payable to the Irish Land Commission, who were not, however, named in the deposited schedules as persons interested, or mentioned in the arbitrator's award. The compensation awarded, being under £20, was paid by the Guardians to the registered owner of the holding who was in occupation thereof and who

**COMPULSORY PURCHASE**—*continued.*
gave them a receipt under section 17 of the Railways (Ireland) Act, 1851. The Guardians contended that this payment and receipt was effectual to vest the plot in them discharged from the annuity payable to the Irish Land Commission. The Commissioners had no notice of the proceedings:—*Held*, 1st, that the annuity was a separate interest from and paramount to the estate of the owner, and the subject of distinct compensation; 2ndly, that as the Commission were not named in either the deposited schedule or in the award, they were not affected by the publication of the notice of the appointment of the arbitrator: *In re Doyne's Traverse* (24 L. R. Ir. 287). 3rdly, that the payment of the purchase-money to the owner of the holding, and his receipt for it, did not operate to vest the plot of ground in the Guardians discharged of the annuity to the Land Commission. *In re Local Registration of Title Act*, 1891, *and Parkinson a registered owner of land* - - - - MADDEN, J., 390

—— Settlement—Trustees—Appointment of 1
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—— Superfluous land—Disposition of - 200
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**CONTINGENT REMAINDER**—*Will—Estate in realty—Vesting of estate—"If alive."*] *K.* devised real estate, of which he was seized in fee-farm, in the following terms:—"To my daughter Catherine *R.* for her life, and should her husband *W. R.* survive her, he is to have them for his life, and at his decease I bequeath them to my nephew *J. C. K.*, if alive: if not, to his next brother *E. K.*; and in case the latter should also be dead, they are to go to the eldest survivor of my brother's four younger sons." The testator's daughter survived her husband and all the testator's nephews, some of whom, however, including both *J. C. K.* and *E. K.* were alive at the death of *W. R.*:—*Held*, by the Court of Appeal (reversing the decision of Porter, M. R.), that the words "if alive" meant if alive at the deaths of both the daughter and her husband, and that, in the events which happened, upon the death of the daughter in 1895, the estate was undisposed of, and passed to the testator's heir-at-law. *In re Dundalk and Enniskillen Railway Co.; Ex parte Roebuck* [M. R. 219; APP. 228

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**CORPORATION**—*continued.*
Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), by a Local Government Board Order confirmed by Act of Parliament, acquired certain premises for the purpose of widening a street. The order provided that in case any part of the premises were not required for the purpose aforesaid, the sanitary authority might sell the same, or demise or grant the same in fee-farm subject to such rents as might seem expedient to the sanitary authority. By previous local Acts incorporating the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), the Corporation were given powers of disposing by auction or tender, and subject to certain conditions and restrictions, of lands not required for the purposes of the Acts. One of those Acts gave power to the Council to make by-laws for regulating the carrying on of their business, but provided that no such by-law should be of any force until forty days after the same should have been sent to the Lord Lieutenant, and gave power to him to disallow the same. By one of certain standing orders adopted by the Council on the 1st January, 1894, for the regulation of their proceedings, it was provided that full publicity should in all cases be given of intended sales or letting of Corporation property, and that all property should, in the first instance, be put up for sale by auction subject to such restrictions, if any, as might be requisite. These standing orders had not been sent to the Lord Lieutenant, pursuant to the local Act, nor had they been made under seal or confirmed by the Local Government Board as required by the Public Health Act in the case of by-laws. Portion of the property was not required for the purpose for which it was taken, and the Corporation advertised it to be let by auction in lots in fee-farm, and fixed reserved prices as to the rents. Lots 11 and 12 adjoined property of *R.* who had been in successful litigation with the Corporation about windows in his premises, the existence of which prevented another owner from building in accordance with an agreement between him and the Corporation—the carrying out of the Corporation scheme being thus interfered with. There was also another dispute between *R.* and the Corporation about a right of way claimed by him over other premises. Lots 11 and 12 were not put up for auction, and the Corporation subsequently passed a resolution adopting an agreement with *R.* to give him a fee-farm grant thereof at a rent about 10 per cent. less than that fixed for the auction as the reserved rate, *R.* agreeing to relinquish all rights to the windows and passage. In an action on behalf of ratepayers to restrain the Corporation from acting on the resolution:—*Held*, that the powers as to superfluous land conferred by the order were not affected by the conditions and restrictions imposed by the earlier Acts; that the

**CORPORATION**—*continued.*
standing orders were by-laws, and that, not having been approved, they had not any force; that the Corporation as sanitary authority had under the order a discretion as to the mode of disposing of the superfluous ground either by sale or letting for years, or granting in fee-farm, that no obligation was imposed on them by the Sanitary Act or the order as to how the sale was to be effected whether by public auction or tender, or private agreement; that so long as they performed their trust for the benefit of the ratepayers honestly, and without a view to private advantage, that discretion could not be interfered with by the Court. And the Court being satisfied that the action of the Council and its committee was perfectly *bona fide*, and was believed by them to be beneficial to the city and its inhabitants, and that the unliquidated portion of the consideration for the grant was honestly estimated by the Corporation as worth the difference between the rent agreed to and that fixed as a reserved rate:—*Held*, that the passing of the resolution to adopt the agreement was within the scope of the authority of the Council, and could not be restrained as being *ultra vires*. To establish such a case of undervalue as would in itself justify the interference of the Court, it is not enough to show that a higher price might possibly have been obtained: it must be a gross undervalue, a price so inadequate as in itself to show *prima facie* that the transaction was not a fair one. *Attorney-General (Curley and others)* v. *Belfast Corporation* [V.-C. 200

2. —— *Without common seal—Specific performance—Negotiations by the Board of Control of Lunatic Asylums with owner in fee for the purchase of lands—Death of owner—Claim by devisee and personal representatives for the proceeds of the sale—Conversion.*] The Board of Control of Asylums for the Lunatic Poor of Ireland entered into negotiations with Miss *H.* during her lifetime for the purchase from her of certain lands, of which she was seized in fee, for the purpose of erecting a lunatic asylum thereon. Under the Act of Parliament (1 & 2 Geo. 4, c. 33) it was necessary for the Board, before they could have power to acquire any lands, to obtain an Order in Council authorising them to do so. It was not until the 3rd January, 1894, several months after the negotiations had taken place, that the Board obtained the necessary Order. Between the date of obtaining the Order in Council, and the death of Miss *H.*, which occurred on the 7th February, 1895, no further step appeared to have been taken in reference to the matter. After her death all parties were anxious to have the purchase carried out; but a question arose between her devisee and her personal representatives, whether a valid contract for the purchase of the lands had been concluded between

**CORPORATION**—*continued.*
the Board and Miss *H.* during her lifetime, so as to operate as a conversion of the property from realty into personalty. The Board of Control having instituted an action for specific performance against the devisee and personal representatives of Miss *H.*:—*Held* (on a special case stated for the opinion of the Court pursuant to Order XXXIV.), that before the Board of Control could have power to contract for the acquisition of lands, it was a condition precedent for them to obtain an Order in Council authorising them to do so; that the doctrine that a corporation might contract without seal for the purchase or sale of property, necessary for carrying on the business for which the corporation was created, did not apply to a case where the power of the corporation to do the act was not to come into existence unless or until a certain prescribed condition had been performed by them which had not been performed; that the subsequent obtaining of the Order in Council could not relate back so as to ratify previous negotiations, which, whether in themselves amounting to a concluded agreement or not, were under the circumstances a mere nullity, and that consequently there was no conversion of the property into personalty in the lifetime of Miss *H.*, and that her devisee was the proper party to convey and receive the purchase-money. *Holmes* v. *Trench* - - V.-C. 319

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**COVENANT TO RENEW**—*Lease and sub-lease for lives renewable for ever—Construction—Sub-lessee bound to accept renewal—Implied covenant.*] By lease and release of 13th and 14th August, 1790, *C.* demised to *T. F.* and *W. F.* certain lands for three lives, with a covenant by the lessor for perpetual renewal. By sub-lease, dated 27th October, 1814, *E. F.*, in whom the lessees' interest in the lands had become vested, sub-demised portion of the lands to *H. G.* for the lives of the persons therein named, and for and during such lives as should be added, pursuant to the covenant for perpetual renewal thereinafter contained. *E. F.* covenanted with *H. G.* to obtain a renewal of the head lease on the dropping of any life, and to renew or make a new lease to *H. G.*, so as that *H. G.*, his

**COVENANT TO RENEW**—*continued.*
heirs and assigns, might have for ever three lives in being; and in case *E. F.* should neglect or omit to obtain such renewal, that *H. G.* might obtain same in his own name in trust for *E. F.* All the estate and interest of *H. G.* in the lease of 27th October, 1814, were vested in the defendants:—*Held*, that, upon the true construction of the lease of 27th October, 1814, it contained an implied covenant on the part of the lessee to accept renewals from the lessor upon his obtaining renewals of the head lease on the fall of any of the lives. *Foley* v. *Roland* - - - - - - V.-C. 311

**2.** —— Toties quoties—*Purchase of superior interest by covenantor—Obligation to renew.*] *A.* leased to *M.* in 1811 for a term to expire 1st May, 1910. *M.*, in 1828, subleased to *H.* for a term to expire 1st May, 1909, with a covenant, whenever he took a new lease, to renew to *H.* *H.'s* estate became vested in *T.*, who, in 1850, subleased to *K.* for a term to expire 1st November, 1908, and *T.*, for himself, his executors, &c., covenanted that when and so often as he or they should have received or obtained a renewal or new lease for any extended term he and they would grant to *K.* a similar new lease or renewal for such extended period, reserving six months of the term as a reversion. In 1846 *A.'s* representatives made a lease to *D.* for 999 years, at a rent to commence on the expiration of the lease to *M.* In 1873 the interest under that lease was, by Landed Estates Court deed, conveyed to *T.*:—*Held*, by the Vice-Chancellor, and by the Court of Appeal, that *K.'s* representatives were entitled to a renewal from *T.'s* representatives for the term in the lease of 1846, less six months. *Lytle* v. *Fox*
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**DIVISIONAL COURT** — Judicature Act, ss. 36, 37, 38 - - - - 98, 104
*See* Action to Recover Possession of Land.

**EASEMENT**—*Prescription—Presumption of lost grant—Extinguishment—Land Judge's Conveyance—Landed Estates Court Act*, ss. 54, 55, 61—*Land Law* (*Ireland*) *Act*, 1896, *sect.* 34, *sub-sect.* 3.] By deed, dated 11th December, 1896, the Land Judge granted to the plaintiff in fee the bed and soil of the river Shannon adjoining certain townlands mentioned, extending to the middle thread of the river (save and except the sites of certain eel weirs), and the several and exclusive right of fishing for all kinds of fish in the waters flowing over the bed and soil aforesaid, save and except the eel fishings; subject, as to part of the lands granted, to a public right of way, and subject, as to all the premises granted, to such other rights of way (if any) as then existed. The defendants were owners of the weirs and of all rights of fishing for eels by means thereof. In connexion with the eel fishery, there was a practice of placing the eels, when caught, in large boxes or tanks which rested on a part of the bed and soil of the river conveyed to the plaintiff. These receptacles were attached to the bank by means of chains, and could be shifted further from, or nearer to, the shore, according to the depth of water. The eels were thus kept alive for marketable purposes. For a period of such length that it might be taken to be forty years, in the absence of proof to the contrary, or, at any rate, of such duration as to justify the inference of a lost grant to quiet possession, the defendants or their predecessors in title had used these receptacles, or somewhat similar appliances, in like manner in connexion with the fishing for eels:—*Held*, (1) that the right to use the tanks or boxes was an easement. (2) That the conveyance of 1896, being made subject only to "all rights of way," was not made subject to any other easement whatever. (3) That, even assuming the defendants to have been previously entitled to the easement to place and use the receptacles in the manner proved for storing the eels when caught, that easement was extinguished by the Land Judge's conveyance to the plaintiff. *Ingham* v. *Mackey*
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**EEL-FISHING**—Tanks—Easement - 272
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**EJECTMENT**.
*See* Action to Recover Possession of Land.

**EQUITABLE ESTATE**—Words of inheritance—Deed - - - - - 185
*See* Estate for Life.

**ESTATE FOR LIFE**—*Voluntary settlement—Construction of deed—Rentcharge, or half rents and profits—Executed trust—Equitable estate in fee—Words of limitation.*] By a voluntary settlement, executed in 1870, lands held in fee-farm were conveyed to trustees and their heirs in trust, after the death of the settlor, to pay his wife out of the rents and profits a clear annuity of £100 for her life, and to apply the balance for the maintenance of the settlor's children during their minority. In case the settlor's eldest son *T.* should die or marry without prescribed consent before attaining twenty-one years, his share of the lands was to go to the younger son *G.*; and it was provided that after the death of the settlor's wife "her £100 a-year, or half the rents and profits of" the lands should be paid to *G.* On *G.'s* death, or marriage without consent under twenty-one, his "share and proportion of" the lands was to go to *T.*; and if both sons died or married without consent under twenty-one, the lands were to belong to the settlor's daughters, their heirs and assigns, as tenants in common:—*Held*, (1) that *G.* was entitled to a rentcharge of £100 a-year in any event, with the superadded right of taking half the rents and profits whenever the rental exceeded £200 a-year; (2) that *G.* took an estate for life only in the rentcharge. *In re Bennett's Estate; Munster and Leinster Bank, Petitioners* - - - - KENNY, J., 185

**ESTATE PUR AUTRE VIE**—*Devolution of estate—Special occupant—Intestacy.*] A lessee of lands, which had been demised to him, his heirs, executors, administrators, and assigns, for lives and thirty-one years concurrently, by his will devised to trustees in trust for *A. B.*, without any words of limitation in relation to either the legal or equitable interest. *A. B.* died intestate. One of the lives mentioned in the lease was still in existenee. The term of years had long since expired. *Held*, that the heir-at-law and not the personal representative of *A. B.* was entitled to the estate *pur autre vie*. *Wall* v. *Byrne* (2 J. & L. 118), followed. *In re King, deceased; King* v. *King* M. R. 91 [Aff.]

**EVIDENCE**—Presumption of lost grant 272
*See* EASEMENT.

**EXECUTION OF POWER**—Excessive appointment—Perpetuity—Delegation - 403
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—— General power—Wills Act, s. 27 139, 144
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**EXTINGUISHMENT** — Easement — Land Judge's conveyance - - 272
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**FEE-FARM GRANT**—Corporation—Sanitary Authority - - - - 200
*See* CORPORATION. 1.

—— Covenants usual and proper in building leases - - - - - 233
*See* BUILDING LEASE.

**FEE-FARM GRANT**—*continued.*

—— Land Law (Ireland) Act, 1896, s. 40 378
*See* LAND LAW (IRELAND) ACTS. 2.

—— Sale of—Root of title - - 291, 306
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**FEE-SIMPLE** — Equitable estate — Deed — Words of inheritance - - 185
*See* ESTATE FOR LIFE.

—— Merger of incumbrances - - 379, 383
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**FISHERY**—Eels—Tanks—Prescription 272
*See* EASEMENT.

**GIFT**—Incomplete - - - 366, 370
*See* VOLUNTARY TRUST.

**GIFT OVER**—"Any balance remaining" after death of legatee - - - 5
*See* ABSOLUTE GIFT.

—— If appointee for life should die without leaving children - - - - - 403
*See* POWER. 1.

**GLEBE LANDS**—Several purchasers—Incidence of tithe rentcharge—Vesting order—Indemnity - - - 20, 42
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**GRAFT**—Resumption of tenancy by landlord—Limited owner - - 112, 117
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**HEIR**—Estate *pur autre vie*—Intestacy - 91
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**HOTCHPOT CLAUSE**—Settlement—Several funds - - - - - - 403
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**HUSBAND AND WIFE**—Direction for a settlement—Restraint on anticipation—Costs of action - - - 244
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—— Insurance effected by wife on husband's life—Policy "not assignable" - 175
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—— Separation deed—Annuity—Satisfaction 258
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—— Settlement—Annuity - - - 75, 83
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**INCOMPLETE GIFT**—Testimonial—Subscriptions - - - - 366, 370
*See* VOLUNTARY TRUST.

**INDEMNITY**—Glebe lands—Vesting order—Misstatement as to tithe rentcharge
*See* TITHE RENTCHARGE. [20, 42

**INFANT**—Disability—Statute of Limitations—Arrears of tithe rentcharge - 20, 42
*See* TITHE RENTCHARGE.

**INJUNCTION**—*Mandatory—Exercise of statutory powers—Damages in lieu of injunction—Acquiescence.*] The defendants were a corporation, constituted by Act of Parliament, for improving the navigation of the Newry River and Carlingford Lough. In 1884 they obtained a further Act of

**INJUNCTION**—*continued.*
Parliament, which Act expressly referred to certain oyster beds in the lough, the property of the original sole plaintiff, as equitable tenant for life, and provided that the defendants should, during the construction of their works, protect these oyster beds from injury. Between May, 1890, and January, 1891, the defendants cast a quantity of stones, ballast, and rubbish upon a portion of the ground within the ambit of the oyster beds. They were expressly warned against so doing by the plaintiff and his lessee, but the present action was not commenced until 1895. It was proved that the expense of removing the deposit and restoring the beds as far as possible to their original state would occasion an expense to the defendants considerably out of proportion to any advantage the plaintiff would derive from such restoration. The trustees of the property, who intervened in the action, having insisted on a mandatory injunction instead of damages:—*Held*, that there was no acquiescence which would deprive the plaintiffs of their right to such relief, and that they were entitled to an injunction directing the defendants to remove from the oyster beds the ballast and rubbish so deposited, and to restore them to their previous condition and levels. *Woodhouse* v. *Newry Navigation Co.* - - - - - - App. 161

—— Sanitary Authority — Letting superfluous lands - - - - - - 200
*See* Corporation. 1.

—— Specific performance — Antedating lease — Judgment - - - - - 459
*See* Lease.

**INSURANCE.**
*See* Policy of Insurance.

**INTEREST**—Mortgage—Receiver appointed by mortgagee—Arrears due at time of appointment - - - - - 197
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**INTESTACY**—Devolution of title - 91
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—— Specific performance—Antedating lease—Injunction - - - - - 459
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**JUDICATURE ACT**—Ss. 36-38 - 98, 104
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**JURISDICTION**—Trial of ejectment 98, 104
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**LAND JUDGE'S CONVEYANCE** — Extinguishment of easement - - 272
*See* Easement.

**LAND LAW (IRELAND) ACTS**—*Agricultural tenancy—Sale of—Land Law (Ireland) Act*, 1881, *sect.* 1 (14).] Where part of an estate sold by the Land Judge on the petition of an incumbrancer consists of an agricultural yearly tenancy, the sale of the tenancy is subject to the provisions of the Land Law (Ireland) Act, 1881, sect. 1 (14). *In re Haines' Assignees' Estate; Provincial Bank, Petitioners* - - - - - - Ross, J., 267

2. —— *Fee-farm grant—Land Law (Ireland) Act*, 1896, *s.* 40.] Grantees in fee-farm are entitled to the benefit of the 40th section of the Land Law (Ireland) Act, 1896. *In re Browne's Estate* [Ross, J., 378

3. —— *Superior interests—Amount realizable from sale to tenants inadequate to redeem—Land Law (Ireland) Act*, 1896, *s.* 40.] Where the value of superior interests exceeds the amount capable of being realized by a sale to tenants, the 40th section of the Land Law (Ireland) Act, 1896, is inapplicable. *In re Bolton's Estate; Christy, Petitioner* [Ross, J., 401

—— Resumption by landlord—Limited owner—Registered timber - - 112, 117
*See* Tenant for Life and Remainderman. 2.

—— Sale by Land Judge — Conveyance—Easement - - - - - - 272
*See* Easement.

**LANDLORD AND TENANT.**
*See* Action to Recover Possession of Land.
Land Law (Ireland) Acts.
Lease.

**LEASE**—*Specific performance—Ante-dating—Injunction against pleading execution as of other date.*] A judgment for the specific performance of an agreement for a lease directed the lease to be antedated:—*Held*, that the judgment should also restrain the parties, in any action on the lease, from averring that same was of any other date. Existing Irish practice adhered to. *M'Ilroy* v. *Traill* [V.-C. 459

—— Building lease—Usual and proper covenants
*See* Building Lease. [233

—— Covenant to renew - - 311, 340, 355
*See* Covenant to Renew. 1, 2.

—— For lives—Intestacy—Devolution of title 91
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**LEGACY**—Absolute gift—Subsequent gift over of "any balance remaining" after death of legatee - - - - - 5
*See* Absolute Gift.

—— Charged on land—Payment by owner in fee—Release—Merger - - - 383
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—— Direction as to investment, accumulation, and survivorship—Inapplicable to gift of residue - - - - - - 335
*See* RESIDUARY GIFT.
—— Gift of all rent and arrears of rent due to testator at his decease—Apportionment—Grazing rent - - - - - 239
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—— Portions—Amount to be fixed by trustees 337
*See* UNCERTAINTY.
—— Satisfaction - - - - - - 258
*See* ANNUITY.

**LIMITATIONS, STATUTE OF** — *Charge on land—Mortgage executed by owner after absolute order for sale.*] Notwithstanding an absolute order for sale, made on an incumbrancer's petition, the owner can create a valid incumbrance on the lands ordered to be sold; and such incumbrance is protected by the absolute order for sale against the operation of the Statute of Limitations. *In re Nixon's Estate* (I. R. 9 Eq. 7) considered. *In re Swanton's Estate; Atkins, Petitioner*
[Ross, J., 157
—— Tithe rentcharge — Arrears — Infancy of owner - - - - - 20, 42
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**LIMITED OWNER**—Settled Land Acts—Person beneficially entitled to possession 69
*See* SETTLED LAND ACTS. 2.
—— Tenant for life and remainderman
[112, 117, 123
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**LOCAL REGISTRATION OF TITLE ACT**—Unacquired interest - - 390
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**LUNATIC POOR**—Board of control—Contract for purchase of land—Order in Council
*See* CORPORATION. 2. [319

**MANDATORY INJUNCTION** — Improper exercise of statutory powers - 161
*See* INJUNCTION.

**MERGER**—*Incumbrance—Acquisition by owner in fee.*] *A*, who was owner of lands in fee-simple, mortgaged them in 1846. In 1850, a judgment against *A* was registered as a mortgage of the lands. The mortgages of 1846 became vested by assignment in *B*. *A* died, having devised her estate in fee to *B*, whom she also appointed executor. *B* paid simple contract debts and legacies of *A* to a greater amount than was due on foot of the judgment mortgage. *B* died without having given any indication of intention to keep alive the mortgages: —*Held*, that as by the payment of simple contract debts and legacies, *B* had conclusively admitted assets to meet the judgment mortgage and had rendered himself personally liable in respect thereof, it was indifferent to him whether the mortgages

**MERGER**—*continued.*
were kept alive or not, and the Court accordingly held that they were merged. *In re Bury's Estate*
[Ross, J., 379

2. —— *Owner in fee—Payment of incumbrances created by predecessor in title—Release.*] *A* was the owner in fee of lands subject to (amongst other incumbrances) five legacies under the will of *A's* predecessor in title. These legacies were in equal priority *inter se*. The owner, through her agent *B*, raised money to pay off three of the legacies. No assignment or release was executed as to one of them. The other two legatees executed deeds releasing *A* and the lands from their legacies. *A* was not an executing party to these deeds, and made an affidavit stating that she had no notice that the charges so paid off by her were not to be kept alive for her benefit, and never intended that they should be extinguished:—*Held*, that the three legacies were subsisting charges for *A's* benefit. *In re Bayly's Estate* (*No.* 2) - Ross, J., 383
—— Resumption of tenancy by limited owner
[112, 117
*See* TENANT FOR LIFE AND REMAINDERMAN. 2.

**MIS-STATEMENT**—Vesting order—Glebe lands—Tithe rentcharge—Indemnity 20, 42
*See* TITHE RENTCHARGE.

**MORTGAGE**—*Receiver appointed by mortgagee—Arrears of interest due at date of appointment—Duty to pay same—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 24 (8) (iv).] A receiver appointed by a mortgagee under the powers conferred by section 19 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), is bound under section 24, sub-section 8 of that Act to pay arrears of interest due to the mortgagee at the time of the appointment, and not merely interest accruing due after that date. *National Bank* v. *Kenney* - - - V.-C. 197
—— Created after absolute order for sale 157
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—— Judgment for sale—Difficulty of identifying premises—Order for attendance and examination of defendant - - 196
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—— Recorded estate—Derivative title - 376
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**ORDER, GENERAL**—1891, 19th Jan. (Supreme Court), XLII., R. 36 - 196
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**ORDER IN COUNCIL**—Board of Control of asylums for lunatic poor—Purchase of land - - - - - - 319
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**PAYMENT**—Of incumbrances by owner in fee —Release - - - - - 383
*See* MERGER. 2.
**PAYMENT OUT OF COURT**—Settled Land Acts—Appointment of trustees - 1
*See* SETTLED LAND ACTS. 1.
—— Trustees of charitable legacy—Discretion 127
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**PERPETUITY**—Devise of rentcharge to Vegetarian Society - - - 431, 440
*See* CHARITY. 2.
—— Execution of power - - - 403
*See* POWER. 1.
**PETITION FOR SALE**—Recorded estate—Assignment of incumbrance - 376
*See* RECORDED ESTATE.
**POLICY OF INSURANCE**—*Husband and wife —Separate estate—Restraint on anticipation—Insurance effected by wife on life of husband—Tontine—Condition indorsed restraining assignment.*] A married woman effected, in 1885, an insurance on the life of her husband for a period of ten years, and, under the policy, described in margin as "Wife's policy—Endowment," the amount insured was made payable to her for her sole use, if she and her husband both survived that period—(which event happened). The policy was made on condition that certain provisions and requirements annexed to it were to be taken as part of the contract. One of these was "This policy is not assignable": —*Held*, that there was a restraint upon anticipation, and that an attempted charge upon the policy during the currency of the ten years was void. *In re Lavender's Policy* - - - APP. 175
**PORTIONS**—Given by will—Amount to be fixed by trustees - - - - - 337
*See* UNCERTAINTY.
**POWER** — *Execution — Excessive appointment— Appointment to object for life, with power to appoint by will—Perpetuity—Delegation—Appointment to children of S. born in testator's lifetime—Gift over if S. should die without leaving any child—Referential construction—Hotchpot clause—Two funds.*] By marriage settlement certain judgment moneys of the husband were settled upon trust, after the death of the husband and wife, for the children, grandchildren, or other issue of the marriage, born in the lifetime of the husband and wife, or one of them, in such shares as they or the survivor should appoint, and in default of appointment, for the children, being sons, attaining twenty-one, or being daughters, attaining twenty-one or marrying: and certain Government Stock (the wife's fortune) was settled upon trust, after the death of the husband and wife, thereout to pay £1000 to each of the children when being sons they attained twenty-one, or being daughters they attained twenty-one or married, and as to the residue of the said stock for the children, grandchildren, or other issue of the marriage, to be born
**POWER**—*continued.*
in the lifetime of the husband and wife or one of them, in such shares as they or the survivor should appoint, and in default of appointment, for the children being sons attaining twenty-one, or being daughters attaining twenty-one, or marrying. The settlement contained a proviso that in case any appointment should be made in pursuance of the powers therein contained or either of them, which should only extend to a part or parts of the said judgment moneys and stock, such appointment should be valid, notwithstanding the non-appointment of the remaining part or parts thereof, but in that case any child entitled to a share under such appointment should be entitled to no further share of the unappointed part or parts of the said respective trust moneys, stocks, &c., unless and until he or she should have brought his or her appointed share into hotchpot. There were children of the marriage two sons and a daughter. The husband died without having joined in any appointment, leaving his wife surviving. Two granddaughters were born in her lifetime. She by her will appointed the judgment moneys to one son, and after reciting the settlement of the stock, and that £1000 was to be paid thereout to each child, she appointed £10,000 thereof to her daughter, and as to the residue of the said stock, she appointed it to trustees upon trust to pay the income to the other son for life, and after his decease upon trust for such one or more of his children born in her own lifetime, and in such shares as he should by will appoint, and in default, for such persons as he should by will appoint, with a gift over in case the son should die without leaving any children, or remoter issue him surviving. The testatrix made a codicil by which she revoked the appointment of the £10,000 stock, and appointed same to trustees upon trust for her daughter for life, and after her death for her child or children, born in the testatrix's lifetime, in such shares as the daughter should by deed or will appoint, and in default of such appointment for such children share and share alike: provided that if her said daughter should die without leaving any child or children, the trustees should hold the said trust funds upon trust for the testatrix's said granddaughters. *Held* (1), that the limitations in the will of the residue of the stock, subsequent to the appointment of the life interest to the son, were void for remoteness, and that the power of appointment to the son was a delegation of the power given by the settlement, and void, and that, so far, those limitations were void on this ground also. (2) That the limitations in the codicil after the daughter's death constituted a direct valid appointment to the daughter's children, born in the testatrix's lifetime, leaving it to the daughter only to appoint the shares in which they should take; that the latter power was separable from the ap-

**POWER**—*continued.*
pointment to the daughter's children, and void as a delegation, leaving the appointment to the children unaffected; and, applying *Ellicombe* v. *Gompertz* (3 My. & Cr. 127) that the gift over was to be construed as applying only to the failure of children of the daughter, born in the testatrix's lifetime, and that the appointment to the grand-daughters was valid. (3) That the single hotchpot clause applied to all the funds without distinction, and that the son to whom the judgment moneys were appointed was bound to bring his interest into hotchpot. *Hutchinson* v. *Tottenham* V.-C. 403

2. —— *To charge limited sum on real estate—General power to appoint charge—Will—General gift—Exercise of general power of appointment—Wills Act, sect.* 27.] A testator by his will declared that it should be lawful for *A.* by deed or writing to limit and appoint, grant, sell, release, and confirm all or any part of certain lands to any person or persons by way of mortgage or otherwise as a security for any sum not exceeding £2000, or by any such deed, writing, or by will, to charge and incumber the lands with the payment of any sum not exceeding £2000 for such use, intent, and purpose as *A.* should think fit to direct and appoint. *A.* by his will, made after the Wills Act, and which did not refer to the power, gave, devised, and bequeathed to his wife all his property real and personal, and all his estate, goods and chattels, money and charges secured upon lands of or to which he was possessed or in any way entitled. *Held* by the Court of Appeal, affirming the decision of Ross, J., that *A.'s* will did not operate under sect. 27 of the Wills Act as an exercise of the power of charging and appointing in favour of the wife. *In re Jones; Greene* v. *Gordon* (34 Ch. Div. 65) distinguished and observed upon. The 27th section of the Wills Act presupposes the existence of some real estate, or some personal estate, as the case may be, which is subject to a general power of appointment, and which though not the testator's property is at his uncontrolled disposition. The language of the section does not extend to the creation of property at the expense of another, or to the imposition of an otherwise non-existent charge upon the property of another, or to the conversion *pro tanto* of the real estate of another into a money charge, which if and when charged will be personal estate which the testator will have power to appoint as he may think fit, but which has no existence unless and until the testator creates it. *In re Wallinger's Estate* [ROSS, J., 139; APP. 144

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—— Ejectment in Chancery Division—Dismissal of action—Jurisdiction - 98, 104
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—— Settled Land Acts—Person beneficially entitled in possession—Power to raise money by mortgage - - - - - 69
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**PRESCRIPTION**—Easement—Tanks for storing eels - - - - - - 272
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**PRESUMPTION**—Lost grant - - 272
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**RECEIPT** — Compulsory purchase — Purchase-money under £20 - - - 390
*See* COMPULSORY PURCHASE.

**RECEIVER** — Appointed by mortgagee—Conveyancing Act, 1881, sect. 24 (8) (iv.)—Arrears of interest - - - 197
*See* MORTGAGE.

**RECORDED ESTATE**—*Record of Title (Ireland) Act, 1865 — Recorded incumbrance — Unrecorded devolution of title—Petition for sale.*] Land which had been the subject of a judicial declaration of title was recorded under the Record of Title Act (Ireland), 1865, and *A.* was duly recorded as an incumbrancer thereon. *A.'s* title to the charge became subsequently vested in *B.* and *C.* by virtue of two deeds which were not recorded:—*Held*, that until their derivative title was recorded, *B.* and *C.* could not sustain a petition as incumbrancers for sale of the land. *In re Bayly's Estate; Fleming and Maffett, Petitioners* - - ROSS, J., 376

**REGISTERED TIMBER** - - 112, 117
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**REMOTENESS**—Appointment void for 403
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**RENT** — *Will — Construction — "All rent and arrears of rent due to me at my decease"—Apportioned part of accruing gale—Grazing money.*] A testator left to *G.* the townlands of *S.*, *B.*, and *C.*; to *A.* the townland of *L.* and "all rent and arrears of rent due to me at my decease, subject to any headrent or taxes due by me on the aforesaid townlands." He bequeathed to *W.* his interest in another holding held by *I.* as tenant, and any arrears of rent due by her at his decease, subject to proportionate part of headrent, &c. The will contained a residuary gift, but the residuary legatee died in the testator's lifetime. The testator died between two gale days. The grazing of part of the lands of *S.* and *B.* had been let for eleven months, expiring on a day subsequent to the testator's decease, at a lump sum payable on that day:—*Held*, that *A.* was entitled to the arrears of rent due out of the lands of *S.*, *B.*, *C.*, and *L.* up to the gale day preceding the testator's death, and to an apportioned part of the gale then accruing due; but that he was not entitled to the grazing money which went as undisposed of. *Allingham* v. *Atkinson* V.-C. 239

—— Receiver—Conveyancing Act, 1881, sect. 24 (8) (iv.)—Arrears - - - 197

*See* MORTGAGE.

**RENTAL**—*Practice—Judgment for sale of mortgaged premises—Difficulty in identifying same—Order for attendance and examination of defendant—Order XLII., Rule* 36.] The judgment in a mortgagee's suit having directed a sale of the mortgaged premises, difficulties arose in Chambers in identifying the property and preparing a rental, and applications to the defendant for information were not complied with. The Vice-Chancellor made an order that the defendant should attend to be examined *viva voce* before the Chief Clerk. *Butterly* v. *Cuming* - - - - V.-C. 196

**RENTCHARGE.**

*See* ANNUITY.

**RESCISSION OF CONTRACT**—*Vendor and purchaser—Contract in letters—Subsequent correspondence—Want of title—Fee-farm grant—Root of title—Title to converted leasehold—Refusal to make title—Breach of contract—Discharge of purchaser.*] By letters of the 6th February, 1897, *C.* offered to purchase *M.'s* interest in certain lands, subject to title to the satisfaction of *C.'s* solicitor, the purchase to be concluded on the 25th April, and *M.* accepted the offer. The premises were held under a fee-farm grant, dated the 21st August, 1852, and made pursuant to the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105). On February 11th *M.'s* solicitor sent to *C.'s* solicitor a draft agreement for sale, which provided that the title should commence with the fee-farm grant. *C.'s* solicitor declined to have this agreement executed, alleging that the letters were the contract; he, however, agreed to waive proof of the grantor's title. A correspondence ensued in which *C.'s* solicitor called for an abstract of title; *M.'s* solicitors replied that if *C.* would accept title on the basis of the draft agreement they would furnish it, but that *M.* would not make further title. On February 22nd *M.'s* solicitors sent the abstract stating "it is distinctly understood that no title prior to the fee-farm grant . . . is to be required." *C.'s* solicitor replied, "in reference to the understanding . . . I don't seek to investigate the title of the grantor," and on March 1st he furnished requisitions, one of which required that the grantee's title to the leasehold interest should be shown. Replies were sent on March 5th stating, amongst other matters, that it had been expressly stipulated that no enquiry should be made behind the grant. *C.'s* solicitor would not accept this, and on March 10th *M.'s* solicitors wrote that if *C.* would not accept the title as stipulated in his previous letters, the matter could not proceed further; the letter concluded—"Please let us know as soon as possible whether your client will proceed or not." On March 13th *C.'s* solicitor wrote that the title was not a marketable one, and that without it *C.* refused to go on with the sale, concluding, "so nothing remains but to send you particulars of my client's costs." *M.'s* solicitors replied that from the first they had intimated that title would not be shown prior to the grant, adding, "We shall, however, make further enquiries, and we might be able to find some document." On the 16th they again wrote saying they had procured a deed which made the matter perfectly clear, and they would send a copy. *C.'s* solicitor answered that as *M.* had declined to carry out the agreement, he had, on receipt of the letter of March 10th, written to *C.*, stopping a sale of her house, and saying that the contract was off. On March 16th a copy of the deed showing the prior title was furnished, but *C.* refused to complete, and her solicitor returned all documents, and furnished his costs to *M.'s* solicitors. They thereupon wrote declining to admit *C.'s* right to terminate the contract. In an action by *M.* for specific performance:—*Held*, by the Vice-Chancellor, that the contract was to be found in the letters of the 6th February; that, having regard to sect. 7 of the Renewable Leasehold Conversion Act, the fee-farm grant could not be relied on as the root of title; that *C.* was justified in her requisition as to the prior title, and that her solicitor had not waived her right to evidence of same. But, that a rescission of the contract could only be by a new contract, showing in clear and unequivocal terms that both parties had agreed to rescind the contract for sale; that the letters of the 10th and 13th March had not that operation; that *C.* had not, under the circumstances, prior to the 25th April, a right to rescind the contract; and that *M.* was entitled to specific performance provided good title could be

**RESCISSION OF CONTRACT**—*continued.*
made. On appeal, *held* (reversing the decision of the Vice-Chancellor), that by the contract the vendor was to give a marketable title to the lands, that by their letter of March 10th the vendor's solicitors declared his incapacity to fulfil this part of the contract, and renounced the same, and the purchaser, having by her solicitor's letter of March 13th elected to treat this letter of March 10th as a breach of the contract, was thereby discharged and released from the contract, and was not liable specifically to perform the same. *Maconchy* v. *Clayton* [V.-C. 291; APP. 306

**RESIDUARY GIFT** — *Will — Construction — Pecuniary legacies — Directions as to investment, accumulation, and survivorship.*] A testator bequeathed pecuniary legacies to four persons, Jane *G.*, Matthew *G.*, Margaret *G.*, and Thomas *G.*, respectively, and left the residue of his property to Thomas *G.* and Robert *G.* and their children, in equal shares. He added certain directions, with reference to the legacies, as to investment, accumulation, and survivorship: — *Held*, that the word "legacies" could not be extended so as to include the residue, and that therefore the directions as to investment, accumulation, and survivorship applied only to the pecuniary legacies. *In re Aiken, deceased; Bolon* v. *Gilliland* - - - V.-C. 335

**RESTRAINT ON ANTICIPATION.**
*See* ANTICIPATION.

**RESUMPTION BY LANDLORD**—Land Law (Ireland) Act, 1881, sect. 21—Tenant for life - - - - - 112, 117
*See* TENANT FOR LIFE AND REMAINDERMAN. 2.

**SALE**—By Land Judge—Agricultural tenancy—Land Law Act, 1881, sect 1 (14) 267
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—— By Land Judge—Conveyance—Extinguishment of easement - - - 272
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—— To Board of Control of asylums for lunatic poor—Order in Council - - 319
*See* CORPORATION. 2.

—— Under judgment—Difficulty of identifying premises—Order for attendance and examination of defendant - - - 196
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—— Want of title—Rescission by purchaser
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**SALVAGE**—Costs—Action by tenant for life, benefiting inheritance - - 123
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**SANITARY AUTHORITY** — Disposition of superfluous land - - - 200
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**SATISFACTION**—Annuity—Bequest - 258
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**SCHEME**—Charitable legacy—Fund in Court
*See* CHARITY. 3. [127

**SEAL**—Contract not under—Corporation 319
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**SEPARATE ESTATE**—Policy of insurance—Condition not to assign - - 175
*See* POLICY OF INSURANCE.

—— Settlement—Direction in will—Fund in Court
*See* SETTLEMENT. [244

**SEPARATION DEED**—Annuity - 258
*See* ANNUITY.

**SETTLED LAND ACTS**—*Compulsory purchase —Payment out of Court—Appointment of trustees.*] By post-nuptial settlement lands were conveyed to trustees, upon trust for the wife, without power of anticipation, and after the death of the husband or wife upon trust for the survivor for life, and subject thereto upon trust for the children of the marriage as the husband and wife should jointly appoint. The settlement contained a power of advancement but no express power of sale. Part of the lands having been taken under compulsory powers, the husband and wife appointed the trust property to the children of the marriage, and a joint application for payment out of the fund to the trustees was made by the husband, wife, children, and trustees. An order was made appointing the trustees of the settlement trustees for the purposes of the Settled Land Acts, and directing the fund to be paid out to them, to be held upon the trusts of the settlement. *In re Belfast Improvement Acts; Ex parte Reid* - - - - - M.R. 1

2. —— *Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *sect.* 2, *sub-sects.* 5–7; *sect.* 58, *sub-sect.* 1, *cl.* vi.—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *sect.* 11, *sub-sect.* 1—*Limited owner—Power to raise money by mortgage—"Person beneficially entitled to possession."*] Testator devised portion of his estates to trustees upon trust to pay out of the rents and profits a proportion of certain annuities and interest on legacies, and to accumulate the residue until a sum sufficient to pay certain debts and the legacies had been formed, and then to pay the said debts and legacies. Subject to these trusts the testator devised the said estates in trust for his son *J.* for life, remainder to *J.'s* sons in tail male, with remainder to the testator's son *C.* for life. *J.* died unmarried. *C.*, who was also one of the trustees of the will, went into possession as tenant for life. The trustees did not accumulate the rents and the testator's debts and legacies remained unpaid. On an application for an order authorizing *C.* to raise money under sect. 11 of the Settled Land Act, 1890 (53 & 54 Vict. c. 69), for the purpose of discharging incumbrances upon the settled lands:— *Held*, that, notwithstanding the trust for accumulation, *C.* was "beneficially entitled to possession" and entitled to exercise the powers of a tenant for

**SETTLED LAND ACTS**—*continued.*
life, although his enjoyment of the estate was intercepted by the provision for accumulation. *Annesley* v. *Woodhouse* - - - V.-C. 69

**SETTLEMENT**—*Will—Bequest to unmarried woman—Direction to settle—Restraint on anticipation—Costs.*] Testator, by his will, bequeathed one-fourth share of his real and personal estate, after certain payments, to his trustees in trust for his daughter *A*, and declared that the same should be paid, and become a vested interest in *A*, on her attaining the age of twenty-one years, or marriage with consent of testator's trustees; and the testator directed that the income should be applied in the meantime during her minority for her maintenance, and that in case she should marry, her share should be so settled that she might enjoy the income thereof during her life for her separate use. *A* married in the lifetime of the testator. After the testator's death a post-nuptial settlement was executed whereby *A* and her husband assigned to trustees *A's* share under the said will upon trust to stand possessed of £5000, portion thereof for the husband absolutely, and to invest the residue of the share, and to pay the income to arise from such investment to the husband until his bankruptcy, or until he should assign or charge same, or until his death; then upon trust to pay the income to *A* for her separate use, without power of anticipation during coverture; then for the children of the marriage, as *A* and her husband should jointly appoint—in default as the survivor should appoint—and in default of appointment for the children or child of the marriage who should attain twenty-one years, or being daughters should marry, in equal shares. In an action brought by *A* and her children to have the post-nuptial settlement declared void, and to have a proper settlement in pursuance of the trusts of the will in relation to *A's* share approved and settled at Chambers. *Held*, having regard to the direction of the will, that *A's* share should be paid to her, and become a vested interest in her on attaining twenty-one years, or marriage, that the settlement made in pursuance of the will should be such as would secure a separate use to *A* for her life, without power of anticipation; that no settlement beyond this was required by the will; and that subject to such a settlement the *corpus* vested absolutely in *A*. *Held*, that the Court could not declare the post-nuptial settlement void, and that inasmuch as the funds, which had been brought into Court under the Trustee Relief Act, were in the hands of the Court, no settlement providing for the separate use of *A* was necessary, and that the action should be dismissed. *Held*, that the Court had jurisdiction to allow the costs of all parties out of *A's* share, notwithstanding the restraint on anticipation on the life estate of *A*. *Dowd* v. *Dowd* [V.-C. 244

**SETTLEMENT**—*continued.*
—— Construction—Annuity - - 75, 83
*See* ANNUITY OUT OF CORPUS.

—— Construction—Hotchpot clause - 403
*See* POWER. 1.

—— Construction—Rentcharge, or half-rents and profits—Equitable estate without words of inheritance - - - - 185
*See* ESTATE FOR LIFE.

—— Tenant for life and remainderman
*See* TENANT FOR LIFE AND REMAINDERMAN.

**SPECIAL CASE**—*Stated in action—Motion for judgment.*] Where in an action a special case is stated to have the questions therein raised decided, a motion must be made for judgment in the original action after the decision in the special case. The proper person to move is the person who has in form succeeded in the original action. *Holmes* v. *Trench* - - - - - - V.-C. 319

**SPECIAL OCCUPANT** - - - 91
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**SPECIFIC PERFORMANCE**—Lease—Ante-dating—Injunction - - - 459
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*See* LIMITATIONS, STATUTE OF.

**STATUTES:—**
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1 & 2 Vict. c. 109—Tithe rentcharge - 20, 42
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**STATUTES**—*continued.*
44 & 45 Vict. c. 49—Land Law, s. 1 (14) 267
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53 & 54 Vict. c. 70—Housing of Working Classes, Sched. 2 - - - - - 390
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*See* CORPORATION. 1.
59 & 60 Vict. c. 47—Land Law, s. 34 (3) 272
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—— s. 40 - - - - - - 378, 401
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**STATUTORY POWERS**—Improper exercise of—Mandatory injunction - - 161
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**SUBSCRIPTIONS** — Testimonial — Voluntary trust - - - - - 360, 370
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**SUPERFLUOUS LAND**—Sanitary Authority—Disposition - - - - - 200
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**SUPERIOR INTERESTS**—Purchase-money on sale to tenants insufficient to redeem [401
*See* LAND LAW (IRELAND) ACTS. 3.
**TANKS**—Storage of eels - - - 272
*See* EASEMENT.

**TENANT FOR LIFE AND REMAINDERMAN**—*Practice—Costs—Proceeding by tenant for life and trustees for protection of settled estate—Salvage—Costs of action made a charge on the inheritance—Form of judgment.*] An action was brought by the tenant for life and the trustees of a settled estate to establish their right to a several fishery which formed part of the settled estate, and a decree was made, and a perpetual injunction granted with costs. The plaintiffs being unable to recover the costs from the defendants, who were paupers, instituted a separate action to have the costs made a charge on the inheritance, on the ground that the original action had been brought for the preservation of the fishery, and was in the nature of a salvage suit; and made defendants the next tenant for life, and the first tenant in tail in

**TENANT FOR LIFE AND REMAINDERMAN**—*continued.*

remainder. The defendants filed no defence and gave a consent for judgment:—*Held*, that the Court had jurisdiction to make the costs a charge on the inheritance, and that it was a proper case in which to exercise the jurisdiction. *Hamilton* v. *Tighe* - - - - - - M. R. 123

2. —— *Resumption by tenant for life of tenant's holding on settled lands—Land Law (Ireland) Act*, 1881, *section* 21—*Payment of compensation by tenant for life—Merger of tenancy—Equity against inheritance for compensation paid—Constructive trust—Waste—Cutting timber—Registered timber.*] A landlord, who was tenant for life of settled lands, served an originating notice, seeking to resume possession of a holding under sect. 21 of the Land Law (Ireland) Act, 1881, for the purpose of occupying the same as a residence for herself and family. The sum of £600 was ascertained by the Land Commission as the amount of compensation to be paid by the landlord to the tenant for such resumption. The landlord paid this sum to the tenant and went into possession of the holding, upon which there was timber registered by the tenant. The remainderman subsequently brought an action against the tenant for life, seeking to restrain her from committing waste, cutting timber, &c., on the settled lands. In this action the tenant for life denied committing the waste, and by counterclaim sought to have the sum of £600 so paid by her declared well charged on the inheritance of the lands of which she had resumed possession. On the evidence adduced on behalf of the plaintiff, the Vice-Chancellor was satisfied that no waste had been committed, and refused the injunction asked for in the original action. On the counterclaim the Vice-Chancellor held that, on the resumption of the holding, the defendant did not become entitled thereto for her own exclusive benefit, but that a constructive trust arose in respect thereof in favour of the plaintiff, to the benefit of which he was entitled upon the terms of repaying such proportion of the compensation as his estate in remainder should fairly bear, and accordingly that the plaintiff was put to his election either to insist on having the benefit of the resumption of the holding on paying his contribution to it, or to repudiate it altogether. Thereupon the plaintiff repudiated the resumption of the holding, and the Vice-Chancellor, being of opinion that under such circumstances, in equity, no merger of the tenant's interest in the reversion took place, held that the defendant was entitled to take for her own benefit the interest of the tenant in the holding so resumed, with all rights thereto attaching:—*Held* by the Court of Appeal (varying the order of the Vice-Chancellor) that the resumption having been carried out under the provisions of sect. 21 of

**TENANT FOR LIFE AND REMAINDERMAN**—*continued.*
the Land Law (Ireland) Act, 1881, without any contract between the tenant for life and the remainderman regulating their respective rights, the tenant for life was not entitled to any such equity as that declared by the Vice-Chancellor, or to any charge for the amount of the compensation or any part thereof upon the inheritance. *Martin* v. *Martin* - - - V.-C. 112; App. 117

**TESTIMONIAL** — Subscriptions for — Incomplete gift - - - 366, 370
*See* Voluntary Trust.

**TIMBER**—Registration—Resumption of tenancy by limited owner - - 112, 117
*See* Tenant for Life and Remainderman. 2.

**TITHE RENTCHARGE**—2 & 3 *Wm.* 4, *c.* 119—1 & 2 *Vict. c.* 109—*Lands subject to tithe rentcharge sold to different purchasers in severalty—Extent of liability—Arrears recoverable—Infancy—Statute of Limitations—Common Law Procedure Act*, 1853, *s.* 20—*Vesting Order—Mis-statement—Indemnity—Irish Land Commission*—44 & 45 *Vict. c.* 71, *s.* 2.] On the 24th of November, 1823, a statutable composition for all tithes payable out of certain titheable lands was fixed; and this composition was afterwards assessed and applotted on each parcel of the titheable lands. One-third of the amount assessed and applotted on the glebe lands of the parish of *D.* (portion of the titheable lands) was payable by the vicar of the parish to the predecessors in title of the father of the plaintiff. Under the Tithe Rentcharge Act the glebe lands of the parish of *D.* became liable to and chargeable with the annual payment of a tithe rentcharge of £8 13*s.* 1*d.*, which represented the vicarial tithe, the right to which became vested in the father of the plaintiff, and was duly paid to him by the vicar of the parish up to 1869, and afterwards by the Commissioners of Church Temporalities (in whom the glebe lands were then vested) until 1876. On his father's death in 1876 the vicarial tithe vested in the trustees of his will in trust for the plaintiff, who was a minor. The tithe rentcharge was paid to the trustees of the will up to and ending the 1st of November, 1877, since which date no further payment was made. In 1878 each of the defendants became entitled to an estate or interest in the glebe lands equivalent to a perpetual estate or interest, as defined by 1 & 2 Vict. c. 109, and each of them held a portion of the lands in severalty. The plaintiff attained age in 1891, and in 1894 instituted an action against the defendants, claiming sixteen years' arrears of tithe rentcharge, and a declaration that the entire rentcharge, and the arrears thereof were well charged on the glebe lands of the parish of *D.*, and upon all the estate and interest of the defendants in the lands:—*Held* (by the Court of

**TITHE RENTCHARGE**—*continued.*
Appeal, affirming the decision of the Master of the Rolls), that the plaintiff was entitled to one tithe rentcharge out of the lands, and that he was not bound to look to each separate holder of a part of the lands to ascertain the amount payable out of each portion, or to proceed against the separate holders for several rentcharges, but that only six years' arrears of the tithe rentcharge was recoverable by the plaintiff. By vesting order, dated 1878, the Commissioners of Church Temporalities vested a portion of the glebe lands in the defendants the Representative Church Body. The vesting order stated that the part of the glebe lands conveyed was liable to six shillings tithe rentcharge. In 1885 some correspondence took place between the Representative Body and the Irish Land Commission (as representing the Church Temporalities Commissioners) as regards the fact that the lands were charged with tithe rentcharge exceeding the amount mentioned in the vesting order, but no further steps were taken in reference to the matter until 1894, when, in the action brought by the plaintiff, a third party notice was served by the Representative Church Body on the Land Commission claiming indemnity from them against payment of any sum in excess of the six shillings mentioned in the vesting order. *Held*, by the Court of Appeal, reversing the decision of the Master of the Rolls, that the Irish Land Commission were bound to indemnify the Representative Church Body against payment of any tithe rentcharge in excess of six shillings per annum. *Conolly* v. *Gorman* M. R. 20; App. 42

**TRANSFER OF ACTION**—Practice 98, 104
*See* Action to Recover Possession of Land.

**TRUST**—Voluntary - - - 366, 370
*See* Voluntary Trust.

**TRUSTEES**—Charitable legacy — Discretion—Payment out of Court - - 127
*See* Charity. 3.

—— Settled Land Acts—Appointment - 1
*See* Settled Land Acts. 1.

—— Will—Amount of portions to be fixed by 337
*See* Uncertainty.

**UNCERTAINTY**—*Will—Construction—Gift of portions—Amount to be fixed by trustees.*] A testator directed that the remainder of his farm, houses, and chattels should be divided equally between his two sons, subject among other payments to the payment of a portion to each of his five daughters, to be determined by his wife and executors, according to the value of their portions of the farm and the service the girls might have rendered to the family, and in case of a daughter's share being a marriage share, according to the match she might make, all of which amount of money and times and ways of payment were to be

**UNCERTAINTY**—*continued.*
determined by his wife and executors:—*Held*, that the gift of portions to the daughters was not void for uncertainty. *In re Conn, deceased; Conn* v. *Burns* - - - - - - - V.-C. 337
—— Bequest to "Christian Brethren"—Religious organization - - - - 423
*See* CHARITY. 1.
**VEGETARIAN SOCIETY**—Devise in trust for - - - - - - 431, 440
*See* CHARITY. 2.
**VENDOR AND PURCHASER**—Root of title—Fee-farm grant—Refusal to make title—Rescission of contract - 291, 306
*See* RESCISSION OF CONTRACT.
**VESTING OF ESTATE**—Contingent remainder—Will—Construction - 219, 228
*See* CONTINGENT REMAINDER.
**VESTING ORDER**—Glebe lands—Tithe rentcharge—Mis-statement—Indemnity
*See* TITHE RENTCHARGE. [20, 24
**VOLUNTARY TRUST**—*Incomplete gift—Subscriptions—Testimonial for past services.*] A number of persons, principally in the county for which *B.* was Member of Parliament, subscribed to present him with a testimonial. The amount subscribed was transferred to treasurers, who were the present defendants, to be retained by them until a meeting should be held, at which a public presentation of the testimonial was to be made to *B.* Before the meeting took place political differences arose between the subscribers and *B.*, in consequence of which the defendants refused to give *B.* the amount subscribed:—*Held*, by the Vice-Chancellor, that the money subscribed constituted an absolute gift to *B.*, and must be dealt with as an express trust in his favour. *Held*, by the Court of Appeal (reversing the decision of the Vice-Chancellor), that there was no trust created in favour of the plaintiff. *O'Brien* v. *M'Meel* V.-C. 366; APP. 370
**WILL**—Charitable gift - 127, 423, 431, 440
*See* CHARITY. 1–3.
—— Contingent remainder—"If alive" after several life estates - - 219, 228
*See* CONTINGENT REMAINDER.
—— Direction for settlement - - - 244
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—— Execution of power—Excessive appointment—Remoteness—Death without leaving children - - - - - - 403
*See* POWER. 1.
—— General power—Wills Act, s. 27 139, 144
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—— Legacy—Absolute gift—Gift over of "any balance remaining" after death of legatee
*See* ABSOLUTE GIFT. [5
—— Legacy—Directions as to investment, accumulation, and survivorship—Inapplicable to gift of residue - - - 335
*See* RESIDUARY GIFT.
—— Legacy—Gift of rent and arrears due—Apportionment—Grazing rent - 239
*See* RENT.
—— Satisfaction - - - - - - 258
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—— Uncertainty—Gift of portions—Amount to be fixed by trustees - - - 337
*See* UNCERTAINTY.
—— Uncertainty—Legacy to Christian Brethren
*See* CHARITY. 1. [423
**WORDS**—"Any balance remaining"—Will 5
*See* ABSOLUTE GIFT.
—— "If alive"—Will - - - 219, 228
*See* CONTINGENT REMAINDER.
—— "Person beneficially entitled to possession"—Settled Land Act, 1882, s. 2 (5) 69
*See* SETTLED LAND ACTS. 2.
**WORDS OF LIMITATION**—Equitable estate—Deed - - - - - - 185
*See* ESTATE FOR LIFE.

THE END.

LIBR.
LAVAL